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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1990

PRESBYTERY OF SEATTLE,

Petitioner,

v.

KING COUNTY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE WASHINGTON SUPREME COURT

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QUESTIONS PRESENTED

1. Did the Washington Supreme Court err in establishing a "threshold inquiry" for reviewing the constitutionality of land use regulations which screens out potential takings claims and redefines those claims for review under substantive due process standards for which the only remedy will be invalidation rather than compensation? Does this "threshold inquiry" undermine the regulatory takings doctrine founded in *Pennsylvania Coal Company v. Mahon*, 260 U.S. 393 (1922), and the compensation requirement upheld in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987)?

2. What is the relevant unit of property to be considered for takings analysis purposes? Are some regulatory actions so complete in depriving the owner's use of a significant portion of a parcel that the action should be recognized as a taking of that portion?

PARTIES TO THE PROCEEDING

The caption contains the names of all parties to this action. The plaintiff corporation does not have any parent or subsidiary companies.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES CITED iv

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 7

I. THE "THRESHOLD INQUIRY" ESTABLISHED IN THE DECISION BELOW DIRECTLY CONFLICTS WITH ESTABLISHED DOCTRINE OF THIS COURT 8

II. DEFINING THE RELEVANT PARCEL FOR TAKINGS PURPOSES IS AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT 18

CONCLUSION 22

TABLE OF AUTHORITIES CITED

Page

CASES

A.A. Profiles, Inc. v. City of Ft. Lauderdale, 850 F.2d 1483 (11th Cir. 1988) 17

Agins v. City of Tiburon, 447 U.S. 255 (1980) 15, 16

Allingham v. City of Seattle, 109 Wash. 2d 947, 749 P.2d 160 (Wash. 1988) 21, 22

Andrus v. Allard, 444 U.S. 51 (1979) 19

Department of Natural Resources v. Indiana Coal Council, Inc., 542 N.E.2d 1000 (Ind. 1989) 17

Electro-Tech, Inc. v. H.F. Campbell Company, 433 Mich. 57, 445 N.W.2d 61 (Mich. 1989) 17

First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987) 3, 9, 13

Georgia Outdoor Advertising v. City of Waynesville, 900 F.2d 783 (4th Cir. 1990) 17

Hodel v. Irving, 481 U.S. 704 (1987) 10, 19

Jackson Court Condominiums, Inc. v. City of New Orleans, 874 F.2d 1070 (5th Cir. 1989) 17

Kaiser Aetna v. United States, 444 U.S. 164 (1979) 10

Keystone Bituminous Coal Association v. DeBenedictis, 480 U.S. 470 (1987) 15, 19

Lake Nacimiento Ranch Company v. County of San Luis Obispo, 841 F.2d 872 (9th Cir. 1987) 17

Loretto v. Teleprompter Manhattan CATV Corporation, 458 U.S. 419 (1982) 20

TABLE OF AUTHORITIES CITED – continued

Page

McClimans v. Board of Supervisors of Shenango Township, 529 A.2d 562 (Pa. Commw. 1987) 17

Nectow v. City of Cambridge, 277 U.S. 183 (1928) 19

Nollan v. California Coastal Commission, 483 U.S. 825 (1987) 15

Orion Corporation v. State, 109 Wash. 2d 621, 747 P.2d 1062 (1987) 11

Penn Central Transportation Company v. City of New York, 438 U.S. 104 (1978)..... 12, 19, 20, 21

Pennsylvania Coal Company v. Mahon, 260 U.S. 393 (1922) 12, 13

San Diego Gas & Electric Company v. City of San Diego, 450 U.S. 621 (1981)..... *passim*

Seawall Associates v. City of New York, 74 N.Y.2d 92, 542 N.E.2d 1059 (N.Y. 1989)..... 17

Sederquist v. City of Tiburon, 765 F.2d 756 (9th Cir. 1984)..... 17

United States v. General Motors, 323 U.S. 373 (1945) 9

Statutes

28 U.S.C. § 1257(a) 2

Rules and Regulations

Supreme Court Rule 10.1(b)..... 7

Rule 10.1(c)..... 7

TABLE OF AUTHORITIES CITED – continued

Page

UNITED STATES CONSTITUTION

Fifth Amendment 2, 3

Fourteenth Amendment 2

MISCELLANEOUS

Bosselman, Callies, and Banta, The Takings Issue (1973) 12

Sax, Takings and the Police Power, 74 Yale L.J. 36 (1964) 10

Sax, Takings, Private Property and Public Rights, 81 Yale L.J. 149 (1971) 10

Stoebuck, Police Power, Takings, and Due Process, 37 Wash. & Lee L. Rev. 1057 (1980) 10

Stoebuck, San Diego Gas: Problems, Pitfalls and a Better Way, 25 Wash. U.J. Urb. & Contemp. L. 3 (1983) 11, 12, 13, 14

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PETITION FOR WRIT OF CERTIORARI TO THE WASHINGTON SUPREME COURT

OPINIONS BELOW

The decision of the Washington Supreme Court is reported at 114 Wash. 2d 320, 787 P.2d 907 (1990), and is reproduced as Appendix A (App.). Page references are to the version in the appendix. The unpublished decision of the Washington Court of Appeal, Division 1, is reproduced as Appendix B.

JURISDICTION

The decision of the Washington Supreme Court, review of which is sought in this petition, was entered on March 15, 1990. The order denying a petition for rehearing was filed on May 17, 1990. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The federal constitutional provisions at issue in this matter are the Fifth and Fourteenth Amendments to the United States Constitution. The Fifth Amendment provides in part: "[N]or shall private property be taken for public use, without just compensation." The Fourteenth Amendment provides in part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

The ordinance at issue is King County Ordinance No. 7746, passed September 2, 1986. The relevant provisions of the ordinance are set out in Appendix E.

STATEMENT OF THE CASE

This is an inverse condemnation action. The property owner, Presbytery of Seattle (Presbytery), contends that a King County land use regulation takes Presbytery's property for public use without payment of just compensation. Presbytery below sought compensation as

guaranteed by the Just Compensation Clause of the Fifth Amendment to the United States Constitution.[1]

The decision of the court below rejected Presbytery's compensation claim. That decision articulates a new and radically different approach for evaluating land use regulations under the federal Constitution. The novel path chosen by the Washington court, which will be discussed in greater detail below, limits regulatory takings claims to cases where the regulation "actually enhances a publicly owned right in property." App. at A-9. If the regulation does not enhance public rights in property, but instead seeks to prevent public harm, a takings analysis is not employed. In that event, the Washington court found that property owners are relegated to an invalidation remedy under substantive due process standards. App. at A-10. In short, except in narrowly restricted types of cases, the court below has resurrected the "invalidation only" rule adopted in California, and overruled by this Court in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987).

The decision below accomplishes this result by use of a "threshold inquiry" employed to determine whether a

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[1] The federal question sought to be reviewed was initially raised in the complaint. App. F (complaint alleging that county's regulatory actions constitute inverse condemnation of Presbytery's land). Presbytery's motion for partial summary judgment states the issue as being whether the challenged ordinance constitutes a taking contrary to the federal constitution. App. G. The federal takings issue was subsequently raised in each stage of the appellate proceedings (App. at B-6, 7) and the decision of the court below directly addresses the federal takings issue raised in this petition. App. A.

takings analysis or, alternatively, a due process analysis is to be followed. Presbytery contends that this new threshold test improperly screens out valid takings claims and, more fundamentally, is in direct conflict with regulatory takings principles and standards long established by this Court. As will be shown, the court's novel interpretation of the Fifth Amendment is without precedent and conflicts with decisions of other state high courts and the United States Court of Appeals for the Fourth, Fifth, Ninth, and Eleventh Circuits.

The essential facts necessary for consideration of this petition are straightforward. Presbytery owns a four and one-half acre parcel in an unincorporated area of King County, Washington, near the community of Federal Way. Presbytery purchased the property in 1978 for the purpose of constructing a new church. App. at A-2.

A portion of Presbytery's parcel is within a wetland.[2] This wetland, known as Hylebos Wetland No. 18, is a "class 1" wetland[3] and has been in existence for over 12,000 years. The county claims it is the last major wetland in the Federal Way area and is of major environmental significance. App. at A-3.

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[2] The county's wetland planner explained by affidavit the ecological conditions of a wetland. The court below reproduced that explanation in Footnote 3 of its opinion. *See* App. at A-2 n.3.

[3] The county's wetland planner stated that wetlands are rated No. 1 if there is a presence of rare, endangered, or threatened species and the wetland is a sensitive or outstanding potential habitat for the species. App. at A-3 n.6.

In 1986 King County enacted Ordinance No. 7746 which updated the community plan and zoning for the Federal Way area. App. at A-4; App. E. The Washington Supreme Court viewed the ordinance as one which prohibits new construction within the wetland boundaries. App. at A-4. Although the precise boundary line has not been marked, the parties concur that at least one-third of Presbytery's parcel is within Hylebos Wetland No. 18. App. at A-3. Presbytery contends that by precluding all use of its property within the wetland boundary, Ordinance No. 7746 effects a taking for public use without just compensation of at least one-third of its property.

Presbytery filed its inverse condemnation complaint in state court and subsequently moved for summary judgment on the takings issue (reserving calculation of damages for a future hearing). App. G. The county filed a cross-motion for summary judgment seeking dismissal of the claim. The trial court ruled in favor of the county and dismissed the lawsuit on grounds that Presbytery had failed to exhaust its administrative remedies. App. at C-2. The Washington Court of Appeals affirmed. App. at B-1. The Court of Appeals concluded its opinion by explaining that the merits of Presbytery's takings claim based on the federal Constitution need not be addressed due to disposition of the matter on the exhaustion issue. App. at B-6, 7.

The Washington Supreme Court granted Presbytery's petition for review. In the decision below, review of which is here sought, the Washington Supreme Court explained in a "prefatory note" that it "is impossible to analyze the exhaustion doctrine and its futility exception without first having a clear understanding of the tests to

be utilized for regulatory takings . . . . Therefore, this opinion commences with a consideration of recent state and federal case law regarding constitutional limitations on land use regulations." App. at A-6.

Having set its course, the opinion below embarks on a discourse regarding constitutional review of land use regulations. That discussion is highlighted by the court's establishment of its "threshold inquiry." App. at A-8. This new inquiry is of paramount concern and is the primary focus of this petition.

In addition to concerns regarding Washington's new test for screening out federal takings claims, the decision below presents a second significant issue. That issue involves defining the relevant unit of property to be considered for takings analysis purposes.

The ordinance challenged in this case prohibits any development of land lying within the boundary of Hylebos Wetland No. 18. App. at A-4; B-2. Regardless of what uses may or may not be available for the rest of the parcel, Presbytery maintains that at least the area within the wetland boundary has been taken within the meaning of the Constitution.

The county responds by contending that the relevant unit of property to be considered for takings purposes is not limited to the land within the wetland boundary. The takings analysis, according to the county, must focus on whether the parcel as a whole has been taken. The county therefore suggests that since some portions of Presbytery's property may be developed, the parcel as a whole has not been taken.

Resolving the "relevant parcel" issue is a prerequisite to determining whether the futility exception to the exhaustion doctrine applies in this case. The court below decided that the relevant parcel was the entire four and one-half acre lot owned by Presbytery. App. at A-15, 16. Therefore, that court analyzed the futility exception with reference to the entire lot and concluded that applications to develop nonwetlands portions of the property may not be futile. App. at A-20. In contrast, if the relevant unit of property for takings analysis purposes is the specific land area impacted by the wetlands protection ordinance, the futility exception must be considered with reference to that specific portion of Presbytery's property. Under these circumstances, it is clear that any further efforts to exhaust would be futile because the ordinance imposes an absolute ban. At the very least, Presbytery would be entitled to a remand of the matter to the state court for determination of the futility issue in light of the proper relevant parcel analysis.

REASONS FOR GRANTING THE WRIT

Supreme Court Rule 10.1(b) lists among the considerations governing review on certiorari the circumstance when a state court of last resort has decided a federal question in a way in conflict with another state court of last resort, or of a Federal Court of Appeals. Under Rule 10.1(c), a ground for review exists when a state court has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with

applicable decisions of this Court. All four of these grounds for review are present in this case.

I

THE "THRESHOLD INQUIRY" ESTABLISHED IN THE DECISION BELOW DIRECTLY CONFLICTS WITH ESTABLISHED DOCTRINE OF THIS COURT

The stated purpose of the threshold inquiry established by the Washington court is to determine whether a land use regulation should be analyzed under a takings analysis or, alternatively, under a due process analysis. In practical effect, the inquiry amounts to a new hurdle that property owners in Washington must clear in order to bring a takings claim. If the hurdle is not cleared, the compensation remedy is not available and the owner's recourse is simply to pursue a due process claim seeking invalidation of the ordinance.

Avoiding the compensation remedy which accompanies takings claims was a major concern of the Washington court. Indeed, that concern appears to be a motivating factor for establishing the threshold inquiry and thereby converting many takings claims into due process claims. The court below stated:

> "Invalidation of the ordinance (instead of compensation) also avoids intimidating the legislative body, a situation about which we have previously expressed concern. . . . Accordingly, many challenges to land use regulations will most appropriately be analyzed under a due process formula rather than under a 'taking' formula." App. at A-12, 13, 14.

Of course, this Court has rejected such policy concerns when balanced against the constitutional command of the

Just Compensation Clause. *First Church*, 482 U.S. at 317. By resurrecting those concerns and redefining takings claims into due process claims, the decision below attempts to circumvent this Court's *First Church* decision.

A careful examination of the substance of the threshold inquiry reveals an even more fundamental conflict with Supreme Court doctrine. The primary focus of the threshold inquiry is for the court to determine "whether the challenged regulation safeguards the public interest in health, safety, the environment or the fiscal integrity of the area." App. at A-9. Such a regulation is to be "contrasted with one that goes beyond preventing a public *harm* and actually enhances a publicly owned right in property." App. at A-9 (emphasis in original). In short, a court must determine whether the "predominant goal" of the regulation is to protect against public harm as opposed to conferral of a public benefit, *i.e.*, enhancing a publicly owned right in property. App. at A-9 n.13.

The court below thus embraces the theory that regulatory action can result in a taking only when government uses its police power to confer a benefit upon itself, as contrasted with preventing a public harm.[4] At the very outset, this inquiry is meaningless since, as Justice

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[4] The decision below also acknowledges that a taking may occur when a regulation destroys a fundamental attribute of ownership, which it narrowly defines as the rights to possess, to exclude others, and to dispose of property. App. at A-9, 10. However, the court below has conspicuously omitted the right to make reasonable use of property from its definition. *Compare United States v. General Motors*, 323 U.S. 373, 378 (1945). The (continued)

Brennan explained: "Because police power regulations must be substantially related to the advancement of the public health, safety, morals, or general welfare, it is axiomatic that the public receives a benefit while the offending regulation is in effect." *San Diego Gas & Electric Company v. City of San Diego*, 450 U.S. 621, 656 (1981) (Brennan, J., dissenting) (citation omitted).

Nevertheless, the court below adopts the described approach which derives in part from the 1964 doctrinal writing of Professor Joseph L. Sax.[5] However, Professor Sax abandoned his theory in a subsequent 1971 article.[6] Later, in a 1980 article, Professor William B. Stoebuck recognized that Sax had abandoned his original thesis and that the field was open for recapture. Stoebuck, *Police Power, Takings, and Due Process*, 37 Wash. & Lee L. Rev.

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apparent purpose of including this limited basis for pursuing takings claims is to avoid an obvious conflict with certain decisions of this Court. *See, e.g., Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (right to exclude); *Hodel v. Irving*, 481 U.S. 704 (1987) (right to devise property to one's heirs).

[5] Sax, *Takings and the Police Power*, 74 Yale L.J. 36 (1964). Professor Sax suggested that government land use regulations fall into one of two categories based on the purpose for the regulation. The regulation either enhances the government's resource position (*i.e.*, the government acts in an enterprise capacity), or mediates disputes among citizens (*i.e.*, government acts in an arbitral capacity). Economic loss suffered by landowners as a result of government actions in an enterprise capacity (public resource enhancement) is compensable whereas government actions in an arbitral capacity are not compensable.

[6] Sax, *Takings, Private Property and Public Rights*, 81 Yale L.J. 149 (1971).

1057, 1077 (1980). Professor Stoebuck then proceeded in his own article to reformulate Sax's basic idea, but Stoebuck supported the theory upon a different doctrinal basis. Stoebuck wrote a second article in 1983 to further clarify his theory and to compare that theory to Justice Brennan's influential opinion in *San Diego Gas & Electric Company v. City of San Diego*, 450 U.S. 621 (Brennan, J., dissenting). *See* Stoebuck, *San Diego Gas: Problems, Pitfalls and a Better Way*, 25 Wash. U.J. Urb. & Contemp. L. 3 (1983) (Stoebuck II).

The court below, both in the decision now sought for review and in a prior 1987 decision, candidly recognized the influence of Professor Stoebuck's articles on that court's view of regulatory takings doctrine. App. at A-11; *Orion Corporation v. State*, 109 Wash. 2d 621, 645-46, 747 P.2d 1062 (1987). A comparative reading of Stoebuck's articles with the court's decision below clearly reveals significant parallels. Unfortunately, the doctrine espoused by Professor Stoebuck, and now by the Washington Supreme Court, regardless of its theoretical merits or weaknesses, does not reflect the regulatory takings doctrine and jurisprudence of this Court.

Stoebuck's theory is that there is a *qualitative* or *conceptual* difference between exercises of the police power and de facto takings by eminent domain. He contends that while police power actions may impair or affect an owner's property rights, a taking requires a "transfer" whereby the owner not only loses rights but also the governmental entity gains corresponding rights. *See generally* Stoebuck II at 36-40. Stoebuck gives effect to his transfer theory in his summary of the proposed test by stating, "a regulation should be a 'taking' only when [the

regulation's] benefits specially and directly augment governmentally owned rights in land." Stoebuck II at 41. Although different words are used, the substance of Stoebuck's test is identical to the threshold inquiry set forth in the decision below which distinguishes between regulations which prevent public harm and those which "actually enhance[] a publicly owned right in property." App. at A-9.

The fundamental inconsistency between this approach and federal takings jurisprudence is that federal law does not recognize a conceptual difference between exercises of the police power and de facto takings. Unlike Stoebuck and the decision below, federal precedent clearly establishes that the difference between police power regulatory actions which cause takings, and those which do not, is a matter of the degree of interference with private rights. *Pennsylvania Coal Company v. Mahon*, 260 U.S. 393, 413, 416 (1922) (taking occurs where the "extent of diminution . . . reaches a certain magnitude"; takings issue "is a question of degree"); *Penn Central Transportation Company v. City of New York*, 438 U.S. 104 (1978) (identifying several factors to be considered in takings analysis); *San Diego Gas*, 450 U.S. at 641 (Brennan, J., dissenting) (regulatory takings issue is a question of degree); *see generally* Bosselman, Callies, and Banta, *The Takings Issue* 133-36 (1973).

Professor Stoebuck recognizes that his takings theory (requiring that a regulation augment government owned rights in land, *i.e.*, that it confer a public benefit or enhance publicly owned rights in property) is a novel

approach to defining regulatory takings and is conceptually at odds with this Court's precedent. Indeed, Professor Stoebuck agrees that he is charting new waters.

> "[T]he theory being propounded here differs fundamentally and radically from most thinking on the police power 'taking' problem. As seen previously, all judicial theories, and much of the scholarly writing, that allow for regulations to become takings follow or are variations upon *Pennsylvania Coal Co. v. Mahon*. *Mahon*'s thesis is that it is only a matter of degree whether a regulation comes to a 'taking.' There is no qualitative difference between a regulation that 'affects' and a regulation that 'takes' 'property,' only a matter of severity or degree. The central thesis in the present article is that there is a principled, qualitative difference between the operation of regulations that are and those that are not 'takings.'" Stoebuck II at 76-77.

As a scholar, Professor Stoebuck is free to disagree with the existing regulatory takings doctrine adhered to by this Court over the years. However, the court below is not so unrestricted. With regard to its pronouncement of federal constitutional law, the court below must adhere to the established doctrine of this Court. In *First Church*, the majority followed Justice Brennan's lead in *San Diego Gas* (despite Professor Stoebuck's suggestion that there is "a better way") and conclusively stated that *Pennsylvania Coal Co. v. Mahon* is "established doctrine" which has been "unhesitatingly applied" by later Supreme Court cases. *First Church*, 482 U.S. at 316-17.

The decision of the court below represents a dramatic break with Supreme Court regulatory takings principles. The practical impact of accepting Professor Stoebuck's

theory is that regulatory takings claims will be all but eliminated and property owners will be forced to rely on due process grounds for constitutional protection. Stoebuck summarizes the situation this way:

> "The fundamental problem with *Mahon*'s 'too far' test is that it takes into account only one side of the transfer that must occur for a 'taking.' It fails to recognize the transfer element. It considers only the owner's loss and makes a 'taking' turn on the degree of loss. The theory propounded here turns upon a principled, qualitative difference in the operation of regulations that cause or do not cause 'takings.' . . .
>
> " . . . The 'taking' theory proposed would most surely reduce to very few the number of regulations that would effect 'takings.' A vital due process doctrine would be necessary to impose a meaningful constitutional limitation upon those land use regulations." Stoebuck II at 40.

It is not by coincidence that the Washington court in the decision below includes a discussion of substantive due process standards. App. at A-10. The court below engaged in that discussion even though Presbytery's complaint states only an inverse condemnation claim. *See* App. F. Moreover, the court's discussion of due process includes direct reference to Stoebuck's article and his suggested due process considerations. App. at A-11. The effect of the decision below is most apparent. It will narrow the door for takings claims (eliminating the remedy of compensation) and will redirect those challenges

into due process claims (where the only remedy will be invalidation). If federal constitutional law is to be altered in this manner, this Court, and only this Court, is the judicial forum which should be responsible for so doing.

By accepting Stoebuck's concept of regulatory takings, and weaving that concept into its analysis in the form of a threshold inquiry, the decision below necessarily creates a new takings test that is not consistent with the regulatory takings tests formulated by this Court. In *Agins v. City of Tiburon*, 447 U.S. 255 (1980), this Court was very clear in establishing that a zoning regulation "effects a taking if the ordinance does not substantially advance legitimate state interests, *or* denies an owner economically viable use of his land." *Agins*, 447 U.S. at 260 (emphasis added; citations omitted). The *Agins* formulation was repeated and applied by this Court in both *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470, 485 (1987), and *Nollan v. California Coastal Commission*, 483 U.S. 825, 834 (1987).

Significantly, the *Agins* takings analysis does not include any threshold requirement that a regulation enhance a publicly owned right in property as contrasted with preventing a public harm. Moreover, the zoning regulation challenged in *Agins* would not have survived the threshold inquiry now propounded by the Washington court. The open space ordinance challenged in *Agins* was adopted for public safety and environmental reasons, *i.e.*, the predominant purpose was to protect against

public harm.[7] Also, there was no publicly owned right in property that was enhanced by the ordinance. Therefore, under the threshold test, the ordinance would have been insulated from any further takings analysis and the case dismissed. Of course, the *Agins* Court did not insulate the ordinance from Takings Clause review and the two-prong formulation stated in *Agins* has become the accepted framework for guiding the regulatory takings analysis.

A number of state courts of last resort have applied the *Agins* two-prong approach to the regulatory takings issue. Those cases do not recognize the theory that regulatory takings claims are limited to situations where the challenged ordinance enhances publicly owned rights in property. For example, in finding New York's single room occupancy conversion ordinance unconstitutional on takings grounds, New York's highest court expressly followed the *Agins* two-prong approach for analyzing regulatory takings claims.

> "It is basic, however, that such a burden-shifting regulation of the use of private property will, without more, constitute a taking: (1) if it denies an owner economically viable use of his property, *or* (2) if it does not substantially advance

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[7] Regarding the challenged open space zoning ordinance, this Court stated: "The City Council of Tiburon found that '[i]t is in the public interest to avoid unnecessary conversion of open space land to strictly urban uses, thereby protecting against the resultant adverse impacts, such as air, noise and water pollution, traffic congestion, destruction of scenic beauty, disturbance of the ecology and environment, hazards related to geology, fire and flood, and other demonstrated consequences of urban sprawl.' Ordinance No. 124 NS § 1(c)." *Agins*, 447 U.S. at 261 n.8.

> legitimate State interests. Either would be sufficient to invalidate a property-use regulation." *Seawall Associates v. City of New York*, 74 N.Y.2d 92, 542 N.E.2d 1059, 1065-66 (N.Y. 1989) (emphasis added by New York Court; citations omitted).

Similarly, the Supreme Court of Michigan recently recognized that the *Agins* approach is "well-established." *Electro-Tech, Inc. v. H.F. Campbell Company*, 445 N.W.2d 61, 66 (Mich. 1989). Again, there is no additional requirement that the regulation be one that confers a public benefit as contrasted with preventing a public harm. *Accord McClimans v. Board of Supervisors of Shenango Township*, 529 A.2d 562, 568 (Pa. Commw. 1987); *Department of Natural Resources v. Indiana Coal Council, Inc.*, 542 N.E.2d 1000, 1002-07 (Ind. 1989).

Numerous federal circuit courts have also expressly followed the *Agins* analytical approach without any additional inquiry into whether the regulation enhances publicly owned rights in property as contrasted with preventing a public harm. *Lake Nacimiento Ranch Company v. County of San Luis Obispo*, 841 F.2d 872, 877 (9th Cir. 1987) (as-applied taking claim dismissed on ripeness grounds, facial claim analyzed under *Agins*); *Sederquist v. City of Tiburon*, 765 F.2d 756, 761 (9th Cir. 1984); *A.A. Profiles, Inc. v. City of Ft. Lauderdale*, 850 F.2d 1483, 1486 (11th Cir. 1988); *Jackson Court Condominiums, Inc. v. City of New Orleans*, 874 F.2d 1070, 1080 (5th Cir. 1989); *Georgia Outdoor Advertising v. City of Waynesville*, 900 F.2d 783, 787 (4th Cir. 1990).

Thus it is clear that the decision below is inconsistent with and undermines federal constitutional takings

doctrine and, in so doing, establishes a test that conflicts with the takings analysis adopted by this Court and followed by state and federal courts throughout the nation. The Washington decision is an aberration of federal law which this Court should fix. If the decision below is allowed to stand in its present form, property owners in that state will be deprived of constitutional rights and remedies that they would otherwise enjoy if they lived elsewhere. In addition, the decision below, if allowed to remain in the books, will surely be cited elsewhere and thereby inject confusion and disarray to an area of the law that this Court in recent years has attempted to bring into some semblance of order.

A proper understanding of the relationship between land use regulations and the Takings Clause is of critical importance to both property owners and government regulators. Regulators, concerned with fiscal realities, must know with greater certainty the extent of potential liability when enacting land use regulations. Similarly, property owners responding to regulatory actions must be informed of the dimensions of constitutional protection afforded them. The decision below, by embarking on a new and unprecedented constitutional approach to land use regulation, creates uncertainty for all concerned.

II

DEFINING THE RELEVANT PARCEL FOR TAKINGS PURPOSES IS AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

This Court has previously stated that the relevant unit of property to be considered for takings purposes is

the "parcel as a whole" (*Penn Central Transportation Company v. City of New York*, 438 U.S. 104, 131 (1978)) and that the aggregate bundle of property rights must be "viewed in its entirety." *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979). However, this Court has also stated that "these verbal formulizations do not solve all of the definitional issues that may arise in defining the relevant mass of property." *Keystone*, 480 U.S. at 497.

The inadequacy of these verbal formulations for all factual circumstances was clearly revealed in *Hodel v. Irving*, 481 U.S. 704 (1987). Despite the prior ruling in *Allard*, this Court in *Hodel* held that denial of a single strand of property interest was a taking. *Id.* at 718 (deprivation of right to devise property). Justice Scalia, joined by the Chief Justice and Justice Powell, concurred but wrote separately to express the view that *Hodel* was indistinguishable from the situation in *Allard* and therefore concluded that *Hodel* "effectively limits Allard to its facts." *Hodel*, 481 U.S. at 719 (Scalia, J., concurring). Justice Brennan also wrote a concurrence, joined by Justices Marshall and Blackmun, responding to Justice Scalia by stating that *Allard* is not limited to its facts and that *Hodel* is the unusual case. *Id.* at 718 (Brennan, J., concurring).

If anything can be concluded from the foregoing, it is that defining the relevant unit of property to be considered for takings purposes depends upon the particular facts of the case. This would also explain *Nectow v. City of Cambridge*, 277 U.S. 183 (1928), where the Court considered the facts of the case and, based in part upon a master's finding that " 'no practical use can be made of the land in question,' " invalidated a zoning restriction

which applied to only a portion of a larger tract. *Id.* at 187.

In the present case, the wetland protection ordinance literally destroys Presbytery's property rights in approximately one-third of its property. This is not a situation analogous to a setback requirement where the owner still retains the ability to make various uses of the property. Rather, the facts here are more akin to a physical invasion where the ordinance results in a practical ouster of possession and, for the owner, the land is emptied of value. *Cf. Loretto v. Teleprompter Manhattan CATV Corporation,* 458 U.S. 419, 435-36 (1982). Of course, in the physical invasion context, this Court has often recognized that a portion of a parcel may be taken. As stated in *Loretto,* the "constitutional protection for the rights of private property cannot be made to depend on the size of the area permanently occupied." *Id.* at 436. Likewise, it has been recognized:

> "Police power regulations such as zoning ordinances and other land-use restrictions can destroy the use and enjoyment of property in order to promote the public good just as effectively as formal condemnation or physical invasion of property." *San Diego Gas,* 450 U.S. at 652 (Brennan, J., dissenting).

In the present case, if the county sought to protect Hylebos Wetland No. 18 by formal condemnation of the relevant portion of Presbytery's property, compensation for that portion would surely be required. Achieving the identical public objective through regulatory means is not a sufficient basis to deny compensation because Presbytery's rights in the property have, for all practical purposes, been equally extinguished. Under the particular

facts of this case, this Court should address the relevant parcel issue and, in so doing, should recognize the view that "[a] taking does not become a noncompensable exercise of police power simply because the government in its grace allows the owner to make some 'reasonable' use of his property." *Penn Central*, 438 U.S. at 149 (Rehnquist, J., dissenting).

The difficulty that the Washington Supreme Court has had with this very issue also underscores the need for clearer direction from this Court. In an opinion issued only two years prior to the present decision, the Washington Supreme Court found a taking where a Seattle greenbelt ordinance affected only a portion of the plaintiff's parcel. In responding to the city's argument that the owner retained economically viable use of the remaining part of the parcel, the court stated:

> "According to this argument, the City should be allowed to regulate away all rights of ownership to a portion of a person's property, so long as some part of the property remains usable. We find this argument unpersuasive. If the City were to take a portion of certain properties for the purpose of building a road, clearly we would hold that the City must pay for the land so taken. Likewise where, as here, the City takes a portion of certain properties for the purpose of preserving greenbelts, the City must pay for the land taken. To permit the City to accomplish the same purpose under the guise of a zoning regulation would be inequitable and would constitute an unconstitutional taking of private property without just compensation." *Allingham v. City of Seattle*, 109 Wash. 2d 947, 749 P.2d 160, 163 (Wash. 1988).

In the opinion below, the court begins by finding a need to "clarify" its earlier opinion in *Allingham* (App. at A-1) and ends up overruling it. App. at A-16. This abrupt reversal demonstrates that clarification is needed from this Court on the relevant parcel issue.

CONCLUSION

For the foregoing reasons, petitioner respectfully urges this Court to grant this petition for writ of certiorari and reverse the judgment of the Washington Supreme Court.

DATED: August, 1990.

Respectfully submitted,

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APPENDIX A

IN THE SUPREME COURT OF
THE STATE OF WASHINGTON

PRESBYTERY OF SEATTLE, a Washington corporation,	)	
	)	No. 56111-7
Petitioner,	)	
	)	EN BANC
v.	)	
KING COUNTY,	)	
	)	
Respondent.	)	
	)	
ANDERSEN, J. –	)	
	)	(Filed ___)

FACTS OF CASE

A well respected commentator on land use law, Professor Richard L. Settle of the University of Puget Sound Law School, recently wrote that "[r]egulatory taking doctrine is the most perplexing area of American land use law."[1] By our opinion herein, we deal with that subject, elaborate upon our opinion in *Orion Corp. v. State*, 109 Wn.2d 621, 747 P.2d 1062 (1987), *cert. denied*, 486 U.S. 1022, 100 L. Ed. 2d 227, 108 S. Ct. 1996 (1988), and clarify this court's recent opinion in *Allingham v. Seattle*, 109 Wn.2d 947, 749 P.2d 160 (1988).

In this case, the owner of property containing wetlands appeals the dismissal of its inverse condemnation[2]

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[1] Seattle, *Regulatory Taking Doctrine in Washington: Now You See It. Now You Don't*, 12 U. Puget Sound L. Rev. 339 (1989).

[2] This court has defined inverse condemnation as an "action brought against a governmental entity having the power of eminent domain to recover the value of property (continued)

action based upon the owner's failure to exhaust its administrative remedies.

In 1978 the Presbytery of Seattle purchased a single family home located on approximately 4.5 acres of land in Federal Way for $60,000. The financing documents indicate the property was purchased for the construction of a church.

In 1979 the Presbytery informed the Federal Way Planning and Development Commission that in 1980 it intended to begin construction of a church. However, for financial reasons, that building plan fell through. The Presbytery continued to rent out the existing home located on the property and has never filed an application for a development permit for the property.

Part of the Presbytery's property contains a "wetland".[3] King County's wetland planner submitted an

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which has been appropriated in fact, but with no formal exercise of the power." *Martin v. Port of Seattle*, 64 Wn.2d 309, 310 n.1, 391 P.2d 540, *cert. denied*, 379 U.S. 989, 13 L. Ed. 2d 610, 85 S. Ct. 701 (1964).

[3] By affidavit, King County's wetland planner explained as follows. A wetland is a swamp, marsh or bog that supports vegetation typically adapted for life in saturated soil conditions. The ecosystem and habitat value of wetlands is reflected by the diversity of the vegetation and wildlife present in the wetland. The more diverse the vegetation, the more complex the wetland. Complex wetland systems provide places of refuge commonly referred to as "niches". These niches serve as mating, breeding and nesting sites as well as locations for spawning. Wetland areas are also the primary habitat for all waterfowl including ducks, geese and shorebirds. Other forms of wildlife, such as fish, mink, coyote, raccoon, and amphibians also rely on the wetlands for their survival. Salmon (continued)

affidavit which stated that prior to the enactment of the 1986 ordinance, which is here challenged, both the State Environmental Policy Act of 1971 (SEPA)[4] and King County's Sensitive Area Ordinance[5] would have been applied to any development application since wetlands are protected by both acts. The record before us indicates that in 1981 King County conducted an inventory of wetlands and concluded that the wetlands involved in this case, Hylebos Wetland No. 18, was a "class 1" wetland.[6] The County provided affidavits to show that this wetland is in excess of 12,000 years old, is one of the last major wetlands in the Federal Way area and is of major environmental significance to King County. It also contains one of the few *old growth cedar bogs* still in existence in the Pacific Northwest. For purposes of this appeal, the parties concur that Wetland No. 18 comprises approximately *one-third* of the Presbytery's property.[7]

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often spawn in the marshy channels of a wetland and the wetland provides seasonal recharge to streams which are critical for the survival of fisheries. If the wetland area is diminished or disturbed, the ecosystem becomes critically unbalanced and environmental impacts are significant. Niches are destroyed and the wildlife habitat is eliminated or significantly reduced.

[4] RCW 43.21C.

[5] King County Code 21.54.

[6] The County's wetland planner stated that wetlands are rated No. 1 if there is a presence of species recognized by the federal governmental as rare, endangered or threatened and the wetland is a sensitive or outstanding potential habitat for such species.

[7] We note that the Presbytery originally alleged that the wetlands comprised a larger percentage of its property than one-third, but apparently because they are seeking summary judgment, are now relying on the County's estimate of one-third. The County explains that the wetland boundary has not yet been established because the current mapping is only an approximation.

In 1986 the County enacted ordinance 7746 (hereafter the 1986 Wetland Ordinance). The ordinance includes prohibitions on creation of new construction within the wetland boundaries and creates a buffer zone around the wetland (which may be increased if endangered species exist within the buffer) and a native growth protection easement. It is the Presbytery's argument that the ordinance prohibits the development of a substantial portion of its property and thereby effects a taking of property without just compensation. The Presbytery's inverse condemnation action alleges that the County's wetland regulations prevent it from using its land for a church or for any other economically reasonable or profitable use.

At the request of the Presbytery's attorney, a consultant studied the impact of the regulations of the property. He noted the property is zoned S-E-P which usually allows 1.2 dwelling units per acre. He drew a map of a subdivision containing five lots of the required size. He then concluded that three or possibly four of the five lots are destroyed for any use other than open space by the 1986 Wetland Ordinance.

The manager of the County's Building and Land Development Division responded that this consultant's opinion was based on the erroneous assumption that the entire parcel of property consisted of dry, buildable land. The County further stated that such a subdivision could violate not only the 1986 Wetland Ordinance, but also SEPA and King County's Sensitive Area Ordinance. The County declares that although no application has as yet been made for the construction of a church, pursuant to the zoning code a church and parking lot could potentially be built on the property.

Both parties moved for summary judgment. The County moved to dismiss on the grounds that the Presbytery had never applied for a building permit and, therefore, had failed to exhaust its administrative remedies. The County argued that it would not be futile to require exhaustion because the property could still be used for building a church, the purpose for which it had been purchased. The County also noted that its Sensitive Area Ordinance allowed for development of wetlands if application of the wetland ordinance "would deny all reasonable uses of a property".[8]

The trial court granted the County's motion to dismiss based on the landowner's failure to exhaust its administrative remedies. The Court of Appeals affirmed in an unpublished opinion.[9] We herein consider the two issues we have determined to be dispositive and affirm both the Superior Court and the Court of Appeals.

ISSUES

ISSUE ONE. Does a land use regulation which prohibits development of a portion of an undivided parcel of property constitute a "taking" of the portion which must remain undeveloped?

ISSUE TWO. Did the Superior Court and the Court of Appeals correctly apply the exhaustion doctrine to the Presbytery's inverse condemnation action?

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[8] King County Code 21.54.170(B) (part).

[9] *Presbytery of Seattle v. King Cy.*, 53 Wn. App. 1074 (1989).

DECISION

PREFATORY NOTE. The issues presented in this case are interrelated and cannot be analyzed as separate and distinct inquiries. It is impossible to analyze the exhaustion doctrine and its futility exception without first having a clear understanding of the tests to be utilized for regulatory takings and substantive due process violations. In considering factual futility, it is necessary to determine whether the governmental body can provide a solution to the land use problem which would avoid the conclusion of an unconstitutional taking or a due process violation. Any case which considers the futility exception to the exhaustion requirement must view it in the context of the constitutional definition of a regulatory "taking". Therefore, this opinion commences with a consideration of recent state and federal case law regarding constitutional limitations on land use regulations.

ISSUE ONE.

CONCLUSION. A land use regulation which prohibits development of one portion of an undivided parcel of property does not necessarily constitute a "taking" of the portion which must remain undeveloped. Mere regulation on the use of land has never constituted a "taking" or a violation of due process under federal or state law. The problem in any given case is to determine when such a regulation exceeds constitutional bounds. In order to determine whether such a regulation would be unconstitutional either as a "taking" or as a violation of substantive due process, it is necessary to follow the proper tests for inverse condemnation and for substantive due process violations due to excessive land use regulation.

The United States Constitution, U.S. Const. amend. 5, provides in relevant part,

> nor shall private property be taken for public use, without just compensation.

The Constitution of the State of Washington, Const. art. 1, § 16, provides in pertinent part:

> No private property shall be taken or damaged for public or private use without just compensation having been first made . . . [10]

The "tests" for over-regulation have until recently proved somewhat of a quagmire of constitutional theory vacillating between substantive due process and "takings" theory. Both this court and the United States Supreme Court have in the past struggled with the difficult determination of where a mere regulation ends and a "taking" commences.

In 1987 the United States Supreme Court attempted to alleviate the confusion in a trilogy of land use regulation cases. *Nollan v. California Coastal Comm'n*, 483 U.S.

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[10] The words "or damaged" in the Constitution of the State of Washington, Const. art. 1, § 16, could make Washington's Constitution more restrictive than the federal "taking" clause. However, no Washington decision has attached significance to the difference in language in the context of police power regulation. Settle, *Regulatory Taking Doctrine in Washington: Now You See It, Now You Don't*, 12 U. Puget Sound L. Rev. 339, 344 (1989). However, this court has considered actions wherein the government's actions "damaged", rather than "took" private land to be violative of Const. art. 1, § 16. *See, e.g., Great N. Ry. v. State*, 102 Wash. 348, 173 P. 40 (1919), wherein the government's blasting caused debris to fall on and damage plaintiff's railroad tracks.

825, 97 L. Ed. 2d 677, 107 S. Ct. 3141 (1987); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 96 L. Ed. 2d 250, 107 S. Ct. 2378 (1987); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 94 L. Ed. 2d 472, 107 S. Ct. 1232 (1987). In that same year we also decided *Orion Corp. v. State*, 109 Wn.2d 621, 747 P.2d 1062 (1987), *cert. denied*, 486 U.S. 1022, 100 L. Ed. 2d 227, 108 S. Ct. 1996 (1988) (*Orion* II), which attempted to reconcile past federal and state cases involving regulatory (land use) "takings". *Orion* II utilized and coordinated United States Supreme Court authority, case law of this court and scholarly comment to begin to devise a comprehensive formula for use in determining the constitutionality of land use regulations.

DETERMINATION OF WHETHER TO UTILIZE A "TAKING" ANALYSIS OR A DUE PROCESS ANALYSIS

In this state, a land use regulation which too drastically curtails owners' use of their property can cause a constitutional "taking" or can constitute a denial of substantive due process.[11] These two constitutional theories are *alternatives* in cases where overly severe land use regulations are alleged. It is critical that these two grounds be separately considered and independently analyzed because the remedies for each of these types of constitutional violation are different.

To determine which of these two constitutional tests to utilize, *the threshold inquiry* a court must make is

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[11] *Orion Corp. v. State*, 109 Wn.2d 621, 747 P.2d 1062 (1987), *cert. denied*, 486 U.S. 1022, 100 L. Ed. 2d 227, 108 S. Ct. 1996 (1988) (*Orion* II).

whether the challenged regulation safeguards the public interest in health, safety, the environment or the fiscal integrity of an area.[12] A regulation which does that is to be contrasted with one that goes beyond preventing a public *harm* and actually enhances a publicly owned right in property.[13] Secondly, the court should ask whether the regulation destroys one or more of the fundamental attributes of ownership -- the right to possess, to exclude

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[12] This type of determination has been one of the threads in the regulatory use law in Washington for decades. *See, e.g., Conger v. Pierce Cy.*, 116 Wash. 27, 198 P. 377, 18 A.L.R. 393 (1921); *Rains v. Department of Fisheries*, 89 Wn.2d 740, 575 P.2d 1057 (1978); *Maple Leaf Investors, Inc. v. Department of Ecology*, 88 Wn.2d 726, 565 P.2d 1162 (1977); *Orion* II.

[13] Landowners do not have the right to use their property in a manner injurious to the community. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 491-92, 94 L. Ed. 2d 472, 107 S. Ct. 1232 (1987). However, one landowner should not be forced to bear the economic burden to confer a benefit upon the public, the cost of which rightfully should be spread over the entire community. It is the tension between these two concepts which has made "regulatory takings" law so difficult for so many years. We realize that the determination of whether a given regulation seeks to protect the public from harm will not always be an easy decision. Both the conferral of benefit and the prevention of harm are often present in varying degrees. However, the initial decision as to whether the predominant goal of the regulation is the prevention of a real harm to the public or the conferral of a benefit upon other publicly held property must be made according to the facts of each individual case.

others and to dispose of property.[14] If a regulation does not infringe upon a fundamental attribute of ownership, and if it protects the public from one of the foregoing listed harms, then no constitutional "taking" requiring just compensation exists.[15]

SUBSTANTIVE DUE PROCESS

However, even if the regulation protects the public from harm, and does not deny the owners a fundamental attribute of ownership (and is thus insulated from a "takings" challenge), it still must withstand the due process test of reasonableness.[16] The inquiry here must be whether the police power (rather than the eminent domain power) has exceeded its constitutional limits. To determine whether the regulation violates due process, the court should engage in the classic 3-prong due process test and ask: (1) whether the regulation is aimed at achieving a legitimate public purpose; (2) whether it uses

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[14] Settle, 12 U. Puget Sound L. Rev. at 356. *See Department of Natural Resources v. Thurston Cy.*, 92 Wn.2d 656, 601 P.2d 494 (1979), *cert. denied*, 449 U.S. 830, 66 L. Ed. 2d 35, 101 S. Ct. 98 (1980); *Keystone Coal Ass'n*, 480 U.S. at 488 n.18; *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 97 L. Ed. 2d 677, 107 S. Ct. 3141 (1987); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 73 L. Ed. 2d 868, 102 S. Ct. 3164 (1982).

[15] *Orion* II, 109 Wn.2d at 654-57. *See also First English Eyangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 313, 96 L. Ed. 2d 250, 107 S. Ct. 2378 (1987); *Keystone Coal Ass'n*, 480 U.S. at 488-89; *Maple Leaf Investors, Inc. v. Department of Ecology, supra; Goldblatt v. Hempstead*, 369 U.S. 590, 8 L. Ed. 2d 130, 82 S. Ct. 987 (1962); *Mugler v. Kansas*, 123 U.S. 623, 668-69, 31 L. Ed. 205, 8 S. Ct. 273 (1897).

[16] *Orion*, II, 109 Wn.2d at 654-55.

means that are reasonably necessary to achieve that purpose; and (3) whether it is unduly oppressive on the land owner.[17] "In other words, 1) there must be a public problem or 'evil,' 2) the regulation must tend to solve this problem, and 3) the regulation must not be 'unduly oppressive' upon the person regulated."[18] The third inquiry will usually be the difficult and determinative one.

The "unduly oppressive" inquiry lodges wide discretion in the court and applies a balancing of the public's interest against those of the regulated landowner. We have suggested several factors for the court to consider to assist in the determining whether a regulation is overly oppressive, namely: the nature of the harm sought to be avoided; the availability and effectiveness of less drastic protective measures; and the economic loss suffered by the property owner.[19] Another well regarded commentator in this area of the law, Professor William B. Stoebuck of the University of Washington Law School, has suggested a helpful set of nonexclusive factors to aid the court in effecting this balancing. On the public's side, the seriousness of the public problem, the extent to which the owner's land contributes to it, the degree to which the proposed regulation solves it and the feasibility of less

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[17] *Orion* II, 109 Wn.2d at 646-47. *Lawton v. Steele*, 152 U.S. 133, 38 L. Ed. 385, 14 S. Ct. 499 (1894); *Goldblatt*, 369 U.S. at 594-95; *West Main Assocs. v. Bellevue*, 106 Wn.2d 47, 52, 720 P.2d 782 (1986).

[18] Stoebuck, *San Diego Gas; Problems, Pitfalls and a Better Way*, 25 J. Urb. & Contemp. L. 3, 20 (1983).

[19] *Orion* II, 109 Wn.2d at 655 n. 24 (citing *Goldblatt*, 369 U.S. at 594-95).

oppressive solutions would all be relevant. On the owner's side, the amount and percentage of value loss, the extent of remaining uses, past, present and future uses, temporary or permanent nature of the regulation, the extent to which the owner should have anticipated such regulation and how feasible it is for the owner to alter present or currently planned uses. Stoebuck, *San Diego Gas; Problems, Pitfalls and a Better Way*, 25 J. Urb. & Contemp. L. 3, 33 (1983). Use of these factors can materially assist the court in determining whether or not the regulation of use is unduly oppressive to the landowner.

If the regulation is not aimed at the legitimate public purpose, or uses a means which does not tend to achieve it, or if it unduly oppresses the landowner, then the ordinance will be struck down as violative of due process and the remedy is invalidation of the regulation. No compensation (which properly belongs with a "taking" analysis) is warranted in the face of a due process violation.

Invalidation of the ordinance (instead of compensation) also avoids intimidating the legislative body, a situation about which we have previously expressed concern.[20] For example, as commentators have observed in this connection,

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[20] *Orion* II, 109 Wn.2d at 649, explained:

"We can protect landowners from the unfair burden by invoking *either* the constitutional guaranty that property will not be deprived without due process of law, U.S. Const. amends. 5, 14; Const. art. 1, § 3, or the constitutional requirement of just compensation whenever the state exercises its power of eminent domain to take private property for public (continued)

> if local governments in the past had thought that enactment of a land use regulation might result in monetary awards, then "very likely no one would have proposed the planned unit development, the cluster zone, or the floating zone and even if those efforts had received the prior blessing of developers, it is highly unlikely that environmental concerns or regulation of coastal and inland waterways would ever have been risked."

Sallet, *Regulatory "Takings" and Just Compensation: The Supreme Court's Search for a Solution Continues,* 18 Urb. Law. 635, 636 (1986) (quoting Wright, *Exclusionary Land Use Controls and the Taking Issue,* 8 Hastings Const. L.Q. 545, 583 (1981)). Accordingly, many challenges to land use regulations will most appropriately be analyzed under a due process formula rather than under a "taking"

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use. U.S. Const. amend. 5; Const. art. 1, § 16. The crucial difference lies in the remedy to be applied: invalidation or the payment of just compensation.

"This is, of course, not an insignificant difference. Once we characterize an excessive regulation as a taking, the mandate of article 1, section 16 requires just compensation. Likewise, the Fifth and Fourteenth Amendments require payment for the time that the public had use of the land while the regulation remained effective. *First English Evangelical Lutheran Church,* 107 S. Ct. at 2388. Thus, choosing to invoke the takings analysis instead of the due process test will necessarily trigger the specter of financial liability. If all excessive regulations require just compensation, rather than invalidation, land-use decision makers, who adopt regulations in a good faith attempt to prevent a public harm, will nevertheless be held strictly liable for regulations that result in a taking. Undoubtedly, the specter of strict financial liability will intimidate legislative bodies from making the difficult, but necessary choices presented by the most sensitive environmental land-use problems."

formula. This is not to say, however, that a certain class of cases will not have to face a "taking" challenge.

"CONSTITUTIONAL TAKINGS"

Having completed the due process formula, we return to our threshold issue and consider the "taking" analysis used by the United States Supreme Court and by this court in *Orion* II. If we consider threshold inquiries and determine that the challenged regulation goes beyond preventing a public harm to actually enhance a *publicly owned right in property,* or if we determine that the regulation denies the owner a fundamental attribute of ownership,[21] it then becomes necessary to determine whether the regulation effects a "taking" in violation of the Fifth and Fourteenth Amendments and Const. art. 1, § 16.

The "taking" analysis requires that the court first ask whether the regulation substantially advances legitimate state interests. If it does not, then it constitutes a "taking".[22] If it does substantially advance a legitimate state interest, then it becomes necessary to look further and see if the challenge to the regulation is a facial challenge or one involving application of the regulation to specific property. It would not be necessary for the challengers to exhaust administrative remedies in a facial challenge

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[21] Not every infringement on a fundamental attribute of ownership will necessarily constitute a "taking". *See, for example, Pruneyard Shopping Ctr. v. Robins,* 447 U.S. 74, 64 L. Ed. 2d 741, 100 S. Ct. 2035 (1980).

[22] *Orion* II, 109 Wn.2d at 655-56; *Nollan v. California Coastal Comm'n, supra.*

because the allegation would be that application of the regulation to any property would constitute a "taking".[23] If the case is a facial challenge, then the landowner must show that the regulation denies all economically viable use of any parcel of regulated property in order to constitute a taking.[24] In pursuing this inquiry, however, it first becomes necessary to determine just what property it is that the court is to consider.

With the exception of this court's recent decision in *Allingham v. Seattle*, 109 Wn.2d 947, 749 P.2d 160 (1988), neither state nor federal law has divided property into smaller segments of an undivided parcel of regulated property to inquire whether a *piece* of it has been taken or whether a due process violation has occurred with regard to a *piece* of regulated property. Rather, we have consistently viewed a parcel of regulated property in its *entirety*. Federal case law has also specifically refused to focus its inquiry upon a given portion of a regulated property.[25] As the United States Supreme Court in *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 94 L. Ed. 2d 472, 107 S. Ct. 1232 (1987) (quoting *Penn Cent.*

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[23] Settle, *Regulatory Taking Doctrine in Washington: Now You See It, Now You Don't*, 12 U. Puget Sound L. Rev. 339, 357-58, 392-93 (1989) (citing *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 94 L. Ed. 2d 472, 107 S. Ct. 1232 (1987)).

[24] *Orion Corp. v. State*, 109 Wn.2d 621, 656, 747 P.2d 1062 (1987), *cert. denied*, 486 U.S. 1022, 100 L. Ed. 2d 227, 108 S. Ct. 1996 (1988) (*Orion* II); *Keystone Coal Ass'n*, 480 U.S. at 494-95.

[25] *Keystone Coal Ass'n*, 480 U.S. at 496-97; *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 57 L. Ed. 2d 631, 98 S. Ct. 2646 (1978).

Trans. Co. v. New York City, 438 U.S. 104, 130-31, 57 L. Ed. 2d 631, 98 S. Ct. 2646 (1978) explained:

> " 'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature of the interference with rights *in the parcel as a whole*—here the city tax block designated as the 'landmark site.' "

Keystone, 480 U.S. at 497.[26] Similarly, our own state case law demonstrates that a regulatory scheme's economic impact is to be determined by viewing the full bundle of property rights in its entirety.[27]

The landowner in the case before us relies heavily on *Allingham's* views of a "taking" which looked only to one portion of the regulated parcel of property. To the extent that *Allingham* is inconsistent with the foregoing analysis, it is hereby overruled. Additionally, to the extent that *Allingham* equates a physical taking of an owner's land with a regulation upon its use, it is also expressly overruled.[28]

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[26] See also Andrus v. Allard, 444 U.S. 51, 62 L. Ed. 2d 210, 100 S. Ct. 318 (1979).

[27] *Orion* II, 109 Wn.2d at 664. *See also Department of Natural Resources v. Thurston Cy.*, 92 Wn.2d 656, 668-70, 601 P.2d 494 (1979), *cert. denied*, 449 U.S. 830, 66 L. Ed. 2d 35, 101 S. Ct. 98 (1980); *Department of Ecology v. Pacesetter Constr. Co.*, 89 Wn.2d 203, 571 P.2d 196 (1977); *Maple Leaf Investors Inc. v. Department of Ecology*, 88 Wn.2d 726, 565 P.2d 1162 (1977).

[28] *See Keystone Coal Ass'n*, 480 U.S. at 488 n.18; *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 831, 97 L. Ed. 2d 677, 107 S. Ct. 3141 (1987); *Penn Central*, 438 U.S. at 124.

Returning to our "taking" analysis, if the challenge to the regulation is a facial one, and if the landowner succeeds in showing that a regulation denies all economically viable use of any parcel of regulated property, then a constitutional taking has occurred. Practically, however, this should prove to be a relatively rare occurrence.

If the challenge involves an application of the regulation to specific property, then the court should consider: (1) the economic impact of the regulation on the property; (2) the extent of the regulation's interference with investment-backed expectations;[29] and (3) the character of the government action.[30]

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[29] The vested rights doctrine is an example of judicial recognition of investment-backed expectations. Mandelker, *Investment-Backed Expectations: Is There a Taking?*, 31 Wash. U.J. Urb. & Contemp. L. 3 (1987). In addition, the United States Supreme Court has said the expectation must be "distinct" (*Penn Central*, 438 U.S. at 124) and "reasonable" (*Pruneyard Shopping Ctr.*, 447 U.S. at 83). Professor Mandelker has suggested that "distrinct" implies the expectation must have some concrete manifestation and that "reasonable" implies the expectation must be appropriate under the circumstances. This view of "investment-backed expectations" helps to give content to the analysis.

[30] *Orion* II, 109 Wn.2d at 656 (citing *Keystone Coal Ass'n*, 480 U.S. at 495). In considering the character of the government action, we note that permanent physical invasions (even if of minimal effect on the land) have routinely been held to be takings. *See, e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426, 73 L. Ed. 2d 868, 102 S. Ct. 3164 (1982); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 97 L. Ed. 2d 677, 107 S. Ct. 3141 (1987). However, this fact is subject to a qualification noted by the *Nollan* (483 U.S. at 836) Court. "As a prerequisite for development permission, a regulation may require a landowner to dedicate property rights for public (continued)

If the court determines a "taking" has, in fact, occurred, then just compensation is mandated by the Fifth and Fourteenth Amendments and by Const. art. 1, § 16.[31] If the taking was due to an overly severe land use regulation, and was temporary and reversible, the governmental unit involved has the option of curing the taking or maintaining the status quo by exercising its eminent domain power. Whichever it chooses, just compensation must be paid for the period during which the taking is effective.[32]

EXHAUSTION OF ADMINISTRATIVE REMEDIES

As previously noted, exhaustion would be unnecessary if the landowner was engaging in a facial challenge to the ordinance. However, the record presented in this

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use if the regulatory exaction is reasonably calculated to prevent, or compensate for, adverse public impacts of the proposed development." Settle, *Regulatory Taking Doctrine in Washington: Now You See It. Now You Don't*, 12 U. Puget Sound L. Rev. 339, 356 (1989). "[T]he regulatory exaction must reasonably (that is, quite specifically and proportionately) counter adverse public impact of the proposed development." Settle, 12 U. Pudget Sound L. Rev. at 380 n.243 (citing *Nollan*, 483 U.S. at 836-37). *See also Unlimited v. Kitsap Cy.*, 50 Wn. App. 723, 750 P.2d 651, *review denied*, 111 Wn.2d 1008 (1988) (holding that police power is properly exercised when the problem to be remedied by the exaction arrises from the development under construction).

[31] *Orion* II, 109 Wn.2d at 649; *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 321, 96 L. Ed. 2d 250, 107 S. Ct. 2378 (1987).

[32] *Orion* II, 109 Wn.2d at 626, 668; *First English Evangelical Lutheran Church*, 482 U.S. at 321.

case demonstrates that the landowner has not carried the burden of showing that the regulation denies it all economically viable use of any parcel of regulated property. Therefore, we consider the landowner's exhaustion argument in the context of an "as applied" challenge.

Applying the analysis discussed above to the present case, we could arguably conclude that the challenged regulation seeks to safeguard the public interest in the environment and does not appear to enhance a publicly owned right in other property. However, it would be premature at this time to decide whether the regulation denies an essential attribute of ownership. Assuming without deciding, that the regulation should be scrutinized under the 3-prong due process analysis, we simply do not have all the required facts needed in order for this court to apply that formula.

Although it might be possible to determine that the regulation was aimed at achieving a legitimate public purpose and that it used means to achieve that purpose, on the limited record here presented it is not possible to determine whether the regulation was unduly oppressive to this landowner. Without knowledge of the uses to which this property can legally be put, it is not feasible to consider the factors which help to determine "undue oppressiveness". Exhaustion of administrative remedies is, therefore, necessary in order for a court to have before it the facts necessary to make such a determination.

Although the landowners argue that exhaustion would be futile in this particular case, we disagree. Exhaustion of administrative remedies is generally required before resort to the courts, although exhaustion

is excused if a resort to administrative procedures would be futile.[33] United States Supreme Court case law also concludes that a final governmental decision as to permitted uses of land is generally a condition precedent to resolution of an inverse condemnation claim such as the one before us. As that Court has observed, "[o]ur cases uniformly reflect an insistence on knowing the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it."[34] Once exhaustion is raised as a defense, the landowner seeking to establish "futility" as an exception to the exhaustion requirement must persuade the court that futility excuses exhaustion.[35] This is a substantial burden because of the strong public policies favoring the exhaustion doctrine.[36]

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[33] *Estate of Friedman v. Pierce Cy.*, 112 Wn.2d 68, 74, 768 P.2d 462 (1989).

[34] *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 351, 91 L. Ed. 2d 285, 106 S. Ct. 2561 (1986).

[35] *Estate of Friedman*, 112 Wn.2d at 77.

[36] A presumption favoring the requirement that administrative remedies be exhausted exists, based on the following policies:

> [T]o (1) insure against premature interruption of the Administrative process, (2) allow the agency to develop the necessary factual background on which to base a decision, (3) allow the exercise of agency expertise, (4) provide a more efficient process and allow the agency to correct its own mistake, and (5) insure that individuals are not encouraged to ignore administrative procedures by resort to the courts.

Estate of Friedman, 112 Wn.2d at 78 (quoting *Orion Corp. v. State*, 103 Wn.2d 441, 456-57, 693 P.2d 1369 (1985) (*Orion* I)) (citing *South Hollywood Hills Citizens Ass'n v. King Cy.*, 101 Wn.2d 68, 74, 677 P.2d 114 (1984)).

Our recent decision in *Estate of Friedman v. Pierce Cy.*, 112 Wn.2d 68, 768 P.2d 462 (1989) involved a challenge to a planned unit development (PUD) map which required that a substantial amount of land in the PUD remain "open space". The present case is similar in that some portion (perhaps one-third) of the owner's land will have to remain "open space" to protect the Hylebos wetland under present regulations. *Estate of Friedman* made clear that it will be the uncommon case where a landowner can show a constitutional violation without first exhausting available procedures in an attempt to secure a permit for possible use.[37] As noted earlier herein, King County argues that resort to administrative channels would not have been futile because the Sensitive Area Ordinance does allow development of wetlands if application of the wetland ordinance "would deny all reasonable use of a property".[38] As also noted, the County further argues that it is entirely possible that the landowner may be permitted to build a church on its land under existing regulations.

Under all futility/exhaustion authority, when we look to the tests for regulatory "takings" and due process violations, it follows that the Superior Court and the Court of Appeals correctly concluded that the claim of the landowner in this case is not yet ripe for adjudication

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[37] *Estate of Friedman*, 112 Wn.2d at 80.

[38] King County Code 21.54.170(B).

because it has not yet applied for a development permit.[39]

Because the landowner has not as yet sought any development permits, it is not possible to know what effect SEPA and other applicable regulations might have on the property in question. The Court of Appeals appropriately observed that without engaging in the application process, there is no way to know what beneficial use may be made of Presbytery's property, nor any way to know what deprivation of beneficial use was proximately caused by the Hylebos Wetland Ordinance.[40]

In *Estate of Friedman,* we disagreed with the landowner's claim of futility because there the evidence showed only that some county officials testified that the land under consideration had long been open space and should remain open space. In the present case, the only evidence regarding futility is the opinion of the landowner's expert that a number of lots in a hypothetical subdivision would have to remain open space. This was countered, however, by an affidavit of the appropriate county decisionmaker to the effect that under present regulations, the landowner would probably be allowed to build a church on the property. Clearly then, under a

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[39] *Orion Corp. v. State,* 109 Wn.2d 621, 632, 747 P.2d 1062 (1987), *cert denied,* 486 U.S. 1022, 100 L. Ed. 2d 227, 108 S. Ct. 1996 (1988) (*Orion* II); *MacDonald, Sommer & Frates v. County of Yolo, supra; Williamson Cy. Regional Planning Comm'n v. Hamilton Bank,* 473 U.S. 172, 87 L. Ed. 2d 126, 105 S. Ct. 3108 (1985); *Ackerley Communications, Inc. v. Seattle,* 92 Wn.2d 905, 602 P.2d 1177 (1979), *cert. denied,* 449 U.S. 804, 66 L. Ed. 2d 7, 101 S. Ct. 49 (1980).

[40] *Presbytery of Seattle v. King Cy.,* 53 Wn. App. 1074 (1989).

proper definition of regulatory "taking" and substantive due process, the Presbytery has not sustained its burden of showing that exhaustion would be futile.

Affirmed.

/s/ Andersen, J.
Andersen, J.

WE CONCUR:

/s/ Callow, C.J.
/s/ Utter J.
/s/ Brachenbach J.
/s/ Dolliver J.
/s/ Dore A.C.J.
resale only
/s/ Durham, J.
/s/ Smith, J.
/s/ Guy, J.

APPENDIX B

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports but will be filed for public record pursuant to RCW 2.06.040. IT IS SO ORDERED.

/s/ Coleman CJ
CHIEF JUDGE

IN THE COURT OF APPEALS OF THE
STATE OF WASHINGTON

DIVISION I

PRESBYTERY OF SEATTLE, a Washington corporation,	)	NO. 22235-O-I
Appellant,	)	
v.	)	
KING COUNTY,	)	(Filed Apr. 10, 1989)
Respondent.	)	

SCHUMACHER, JPT*--Presbytery of Seattle (Presbytery) appeals from an order dismissing its complaint against King County, which sought compensation for a taking of property resulting from the enactment of the Hylebos Wetland Ordinance. Presbytery contends that its failure to exhaust its administrative remedies was excusable because any resort to the remedies would have been futile. The dismissal is affirmed. In 1978, Presbytery purchased a single family home located on 4.5 acres in

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* Judge John W. Schumacher is serving as a judge pro tempore of the Court of Appeals pursuant to RCW 2.06.150.

Federal Way. The financing documents indicate that the property was purchased for the construction of a church. However, that construction never took place, and the house on the property was rented.

In 1986, King County enacted Ordinance No. 7746 ("Hylebos Wetland Ordinance"), which affected Presbytery's property. The ordinance modified the S-E-P (suburban estates--site plan approval) zoning to impose conditions to protect the Hylebos Wetland. Those conditions include prohibitions on creations of new lots or construction within the wetland boundaries, the establishment of a 100 foot buffer to be preserved as permanent open space, and the creation of a 15 foot native growth protection easement.

Presbytery engaged an environmental consultant, R.W. Thorpe, to analyze the impact of the Hylebos Wetland Ordinance on its property. Thorpe concluded that the zoning would permit five single family residence lots, but that at least three of those lots fall within the wetland boundary or the 100 foot buffer, thus converting those lots into permanent open space. He further opined that development of the remaining lots was doubtful because of a condition that allows for expansion of the buffer in certain circumstances.

In April 1987, Presbytery filed its complaint against King County, asserting that the Hylebos Wetland Ordinance effected a taking of its property, and sought compensation for that taking. Cross-motions for summary judgment were filed. King County's motion was granted on the grounds that Presbytery had failed to exhaust its

administrative remedies before filing its complaint. The court dismissed Presbytery's complaint.

Presbytery argues that the court erred in dismissing its complaint for failure to exhaust its administrative remedies. It contends that filing an application with King County for subdivision of the property or for building permits would have been futile, because the effect of the ordinance is clear and no exceptions or variances are available. It argues that it falls within the "futile acts" exception to the rule requiring exhaustion of administrative remedies before seeking judicial relief. *Orion Corp. v. State*, 103 Wn.2d 441, 693 P.2d 1369 (1985) (*Orion I*); *Allingham v. Seattle*, 109 Wn.2d 947, 749 P.2d 160 (1988).

King County responds that the court was correct in dismissing the complaint because Presbytery never filed a development application for the property, and because the County never had the opportunity to consider and analyze the application. It argues that in addition to the Hylebos Wetland Ordinance conditions, development of the property would be regulated by preexisting statutes and ordinances, including the State Environmental Policy Act (SEPA) and the King County Sensitive Areas Ordinance. It contends that the development possibilities of the property cannot be determined in the absence of a development application. *Orion Corp. v. State*, 109 Wn.2d 621, 747 P.2d 1062 (1987) (*Orion II*); *Estate of Friedman v. Pierce Cy.*, 51 Wn. App. 176, 752 P.2d 936, *review granted*, 111 Wn.2d 1001 (1988), *aff'd*, 112 Wn.2d 68, 768 P.2d 462 (1989).

After the briefing and argument in this case, the Supreme Court filed its opinion in *Estate of Friedman*

v. Pierce Cy. In that case, the landowners argued that presentation of development proposals was factually futile because of testimony "from a number of Pierce County officials which tended to show a uniform belief that the land had long been classified as open space and should remain as open space or become a park." *Estate of Friedman v. Pierce Cy.*, 112 Wn.2d at 73. The Supreme Court affirmed the decision of the Superior Court and the Court of Appeals that the landowners failed to show that submission of the development proposals would have been futile. After holding that the question of futility is one for the court and that a landowner need not show futility by uncontroverted evidence, the Court stated:

> Therefore, it will be the uncommon case where a landowner can show a taking in the absence of exhausting available procedures in an attempt to secure a permit for possible use. In *Orion I* we made this quite clear: factual futility will be found only rarely and on unusual facts. Generally speaking, if a plat application, application for a conditional use permit or variance, or other administrative procedure could result in a decision resulting in beneficial use of the land, factual futility should not be found. Whether factual futility exists must necessarily depend upon case-by-case analysis.

Estate of Friedman v. Pierce Cy., 112 Wn.2d at 80-81.

Presbytery did not meet its burden of showing that an application for subdivision or building permits would be futile. Presbytery's evidence was the conclusion of its consultant that before the Hylebos Wetland Ordinance, the property could have been divided into five lots, but after the ordinance, at least three of those lots would be

permanent open space. It does not address other development possibilities for the property. King County's evidence was that the ordinance would not clearly prohibit the use of the property as a church, its original purpose for purchasing the property. Presbytery responded that under the guidelines it uses, the area remaining after the enactment of the ordinance is too small for construction of a church and parking lot.

This evidence indicates that an application for development "could result in a decision resulting in beneficial use of the land". King County must have the opportunity to make a final determination on the development potential of Presbytery's property. As the Supreme Court noted:

> Courts cannot address inverse condemnation claims in a vacuum. They must be able to ascertain the remaining value of the regulated property. This necessity underlies the requirement of finality of governmental action . . . . The exhaustion doctrine tends to assure that some final governmental determination as to use has been made, thus facilitating resolution of the question whether land use regulations so deprive the land of economic viability as to amount to a taking.

Estate of Friedman v. Pierce County, 112 Wn.2d at 80.

The cases where factual futility has been found are distinguishable. In *Orion I* and *Orion II,* the Supreme Court held that applying for a shoreline development permit was futile because only two uses of the property were potentially conceivable on Orion's property, one (recreation) that would provide no economic return, and the other (aquaculture) that would be incompatible with

permitted uses in the restricted area. *Orion I*, 103 Wn.2d at 458-59; *Orion II*, 109 Wn.2d at 633. In *Allingham*, the Court held that seeking a variance from the Seattle Greenbelt Ordinance was futile because even if all available variances were granted, the Ordinance would still deny the owner of the use of 40 to 50 percent of his property. *Allingham*, 109 Wn.2d at 951-52.

In the case of Presbytery's property, there has been no determination how the Hylebos Wetland Ordinance should be applied to the property. Neither has there been a determination of what effect the pre-existing SEPA regulations and the Sensitive Areas Ordinance had on the property before or after the enactment of the Hylebos Wetland Ordinance. The extent of deprivation of beneficial use was clearly defined in the ordinance invalidated in *Allingham*. There is no such clear definition here.

Without engaging in the application process, there is no way to know what beneficial use may be made of Presbytery's property, nor any way to know what deprivation of beneficial use was proximately caused by the Hylebos Wetland Ordinance. The order dismissing Presbytery's complaint for failure to exhaust its administrative remedies through the application process is affirmed. Accordingly, Presbytery's argument that the ordinance converts half of its property into permanent open space without compensation is an unconstitutional taking under the Fifth Amendment and under article 1, section 16 of the State Constitution need not and will not be addressed.

Affirmed.

APPENDIX C

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

PRESBYTERY OF SEATTLE, Plaintiff, v. KING COUNTY, Defendant.	)	NO. 87-2-07034-4 ORDER (Received May 3, 1988)

THIS MATTER came before the court on plaintiff's motion for partial summary judgment and King County's cross-motion for summary judgment on April 20, 1988. The plaintiff was represented by its attorney of record, Montgomery, Purdue, Blankinship & Austin, by John D. Blankinship and King County was represented by its attorneys of record, Norm Maleng by Ann Schindler, Deputy Prosecuting Attorney. The court having heard oral argument and reviewed the files and pleadings including the following:

-- Plaintiff's Motion for Partial Summary Judgment

-- Memorandum In Support of Plaintiff's Motion for Partial Summary Judgment

-- Declaration of R. W. Thorpe

-- King County's Response to Plaintiff's Motion for Partial Summary Judgment and Cross-Motion of King County for such Summary Judgment

-- Affidavit of Bryan Glynn

-- Affidavit of Dyanne Sheldon

-- Affidavit of Jim Reid

-- Affidavit of Ann Schindler

-- Plaintiff's Rebutal Memorandum on Plaintiff's Motion for Summary Judgment

NOW, THEREFORE, IT IS HEREBY ORDERED that:

1. Plaintiff's Motion for Partial Summary Judgment is denied.

2. King County's Cross-Motion to dismiss plaintiff's lawsuit on the grounds that the owner failed to exhaust its administrative remedies is granted.

3. Presbytery of Seattle's lawsuit is dismissed.

DONE IN OPEN COURT this 3 day of May, 1988.

/s/ Robert E. Dixon
Honorable ROBERT E. DIXON,
Judge

Presented by:

NORM MALENG
King County Prosecuting Attorney

BY /s/ Ann Schindler
ANN SCHINDLER
Deputy Prosecuting Attorney
Attorney for King County

Agreed as to Form; Notice of
Presentation Waived:

MONTGOMERY, PURDUE, BLANKINSHIP
& AUSTIN

BY /s/ John D. Blankinship
JOHN D. BLANKINSHIP
Attorneys for Presbytery of Seattle

APPENDIX D

THE SUPREME COURT OF WASHINGTON

PRESBYTERY OF SEATTLE,

Petitioner,

v.

KING COUNTY,

Respondent.

No. 56111-7

ORDER DENYING MOTION FOR RECONSIDERATION

(Filed May 17, 1990)

The Court having decided unanimously that the petitioner's motion for reconsideration should be denied,

It is ordered that the motion be and it hereby is denied.

Dated this 17th day of May, 1990.

/s/ Keith M. Callow
Chief Justice

114 Wn.2d 320

APPENDIX E

ORDINANCE NO. 7746

AN ORDINANCE relating to Comprehensive Planning; repealing Ordinances 1435, 2401, 2907, 4733 and 6341; repealing KCC 20.12.108; adopting the Federal Way Community Plan Update; and adopting the Revised Federal Way Community Plan Area Zoning.

PREAMBLE:

For the purpose of effective area-wide planning and regulation, the King County Council makes the following legislative findings:

1. The Federal Way Community Plan, adopted June 9, 1975 by Ordinance 2401 and amended by Ordinances 4733 in May 1980 and 6341 in March 1983, augments and amplifies the King County Comprehensive Plan.

2. King County, with the assistance of the Federal Way Community Pan update Citizen Advisory Committee and extensive citizen input, has studied and considered alternative commercial, industrial and multifamily housing development policies and zoning to provide for the orderly development of Federal Way and has considered the social, economic and environmental impacts of the plan and area-wide zoning. King County has prepared and distributed an Environmental Impact Statement for the Federal Way Community Plan Update and Area zoning.

3. The Federal Way Community Plan Update and Area Zoning provide for the coordination and regulation of public and private development and bear a substantial relationship to, and are necessary for, the public health, safety, and general welfare of King County and its citizens.

BE IT ORDAINED BY THE COUNCIL OF KING COUNTY:

SECTION 1. Ordinances 1435, 2401, 2907, 4733 and 6341 and KCC 20.12.180 are hereby repealed and the following is substituted:

A. The Federal Way Community Plan Update, attached to Ordinance 7746 as Appendix A, is adopted as an amplification and augmentation of the Comprehensive Plan for King County.

B. The revised Federal Way Community Plan Area Zoning, attached to Ordinance 7746 as Appendix B, is adopted as the official zoning control for that portion of unincorporated King County defined therein.

INTRODUCED AND READ for the first time this 13th day of January, 1986.

PASSED this 2nd day of September, 1986.

KING COUNTY COUNCIL
KING COUNTY, WASHINGTON

/s/ *Audrey Gruger*

ATTEST:

/s/ *Dorothy M. Owens*
Clerk of the Council

APPROVED this 12th day of September, 1986.

/s/ *Tim Hill*
King County Executive

[ATTACHMENT A TO ORDINANCE NO. 7746]

HYLEBOS WETLAND #18 PROTECTION IS NECESSARY

Hylebos Wetland No. 18 is unique in many ways. Its protection has been a focal point of two planning efforts. For a detailed discussion of the wetland and the related policies, see chapter five of the Federal Way Community Plan.

The development conditions, in tandem with the surrounding land use concept, protect the integrity of the Hylebos wetland system and are vital to the maintenance of its unique qualities. The conditions were drawn from work on wetlands inventory, rating and protection methods currently being developed by the King County Planning Division's Resource Planning Section. (This work is aimed toward revising the Sensitive Areas Ordinance in order to distinguish among wetland types and provide King County's most important wetlands with more comprehensive protection) The property-specific application of the following development conditions are found on the individual zoning maps. These conditions are as follows:

1. *Wetland Studies - Required*

   The Department of Planning and Community Development's director may require a special wetland study for development outside the Hylebos Wetland #18's required 100 foot buffer if the development may cause a wetland alteration or otherwise pose potential significant adverse impacts to wetland values and functions.

2. *Wetland Studies - Preparation and Contents*

   The Wetland study shall be conducted by a biologist, botanist, plant ecologist or similarly qualified professional with the assistance, if required by BALD or

SWM, of a professional engineer. Minimum requirements for identifying and mapping the wetland edge and the preparation and contents of the wetland study shall be contained in administrative guidelines prepared by the Department.

3. *Wetland Edge - Identification*

As a part of the required wetland study, the edge of the Hylebos Wetland #18 shall be identified using a transect or other accepted scientific method which is acceptable to the department; provided, the director is authorized to require a specific method to identify the wetland edge.

The criteria for locating the wetland edge are based on the principle of predominance of wetland plants as set forth in the definition of wetlands which appears in KCC 21.04: "Wetlands areas inundated or saturated by surface or groundwater at a frequency and duration to support, and that under normal circumstances do support, a prevalence of vegetation typically adopted for life in saturated soil conditions."

The wetland edge is the line around the wetland where the prevalence of hydrophytes, or wetland plants, ceases. For the purpose of defining the wetland edge, the prevalence, of hydrophytes ceases where the combined percent of hydrophytes in the overstory, understory and ground over is less than fifty percent.

4. *Protection and Recording*

a. Those portions of the Hylebos Wetland #18 located within a proposed subdivision shall be protected as permanent open space by dedication to a home owner association, community or public body approved by the department director.

For development subject to other permits, King County shall encourage protection of the Hylebos Wetland #18 as permanent easement, conservation easement or Native Growth Protection Easement, dedication or other alternative means acceptable to King County.

b. Creation of new lots other than separate tracts dedicated or reserved as permanent open space shall not be permitted inside the Hylebos Wetland #18.

c. As a condition of any permit approval, the applicant shall record, with the Records and Elections Division, on the title to the subject property or properties, a notice which alters current and future property owners of the presence and location of the Hylebos Wetland #18, King County regulations which may apply to any future development and any conditions required by King County of the permit approval. The notice shall be on a form provided by the director.

5. *Wetland Buffer - Required*

a. General Provisions

1) The width of the buffer shall be determined by measurement which is perpendicular to the identified wetland edge at all points.

2) The outside boundary of the buffer shall be surveyed and shown on all plats, short plats or PUDs.

b. Minimum Buffer Width

New development adjacent to the Hylebos Wetlands shall preserve an undisturbed buffer not less than 100 feet wide.

c. Increased Buffer Width

The buffer's width shall be increased over the required 100 foot minimum when either of the following exist within or adjacent to the wetland buffer: 1) endangered, threatened or sensitive species; or 2) roads, utility rights-of-way, dikes, channels, etc. Provisions for increasing the buffer's width shall be contained in administrative guidelines prepared by the Department.

d. Adjacent Stream Corridors

New development adjacent to streams which enter or leave the Hylebos Wetlands shall preserve an undisturbed corridor, on the property subject to the applicable development permit, which is wide enough to maintain the natural hydraulic and habitat functions of that stream. Provisions for preserving adjacent stream corridors shall be contained in administrative guidelines prepared by the Department.

6. *Alternation*

Alternation of the Hylebos Wetland #18 and its required buffer is prohibited except for: 1) facilities necessary to allow controlled pedestrian access for scientific, educational or interpretive activities; or 2) fences or other barriers necessary to protect wetland habitat.

7. *Enhancement - Required*

Alternation of the Hylebos Wetland #18 or its buffer for facilities necessary to allow controlled pedestrian access for scientific, educational or interpretive activities shall not be permitted unless accompanied by a County-approved enhancement plan.

8. *Restoration - Required*

If the Hylebos Wetland #18 and/or its required buffer has been partially or totally altered without an

approved development permit or in violation of the conditions of any applicable permit, complete restoration pursuant to an approved restoration plan shall be required. Restoration measures include, but are not limited to, removal of fill, regrading to original contours and revegetation of all cleared areas with natives trees and/or plants which are necessary to replace wetland values and functions lost due to alternation. If information on wetland values and functions prior to alternation is not available, the department shall specify the criteria for restoration. Restoration shall be completed prior to approval of any development permits.

9. *Restoration and Enhancement Plans - Preparation and Contents*

. . . .

10. *Water Quantity and Quality*

The following provisions shall apply to the protection of water quantity and quality in the Hylebos Wetland #18:

. . . .

11. *Endangered, Threatened and Sensitive Species - Protection*

. . . .

12. *Human Access*

The following provisions shall apply to human access and interpretive use in the Hylebos Wetland #18:

. . . .

[ATTACHMENT B TO ORDINANCE 7746]

S-E-P to S-E-P

The purpose of this reclassification is to replace the wetland-related development conditions established in 1980. The conditions established during the plan update and approved on September 2, 1986 (Ordinance 7746) were:

- The twelve Hylebos Wetland #18 development conditions shall direct all development of this site. See Section 2B of the area zoning introduction for those conditions.

APPENDIX F

IN THE SUPERIOR COURT OF
WASHINGTON FOR KING COUNTY

PRESBYTERY OF SEATTLE, a Washington corporation,	)	No.
Plaintiff,	)	COMPLAINT FOR DAMAGES FOR INVERSE CONDEMNATION
vs.	)	
KING COUNTY,	)	
Defendant.	)	

The Presbytery of Seattle alleges:

I.

It is a non-profit Washington corporation which has paid all of its annual license fees to the state of Washington to date and has standing to assert this claim.

II.

The plaintiff owns the real property described on attached sheet, which is a tract containing approximately four and one-half acres. Said tract is zoned for purposes which include use of the land as a church for which purpose the plaintiff acquired the property.

III.

In the guise of protection of wetlands the defendant now prevents use of the plaintiff's land for a church and

associated parking or for any other economically reasonable or profitable use. The actions of the County constitute inverse condemnation of the plaintiff's land for which the defendant should be required to pay the plaintiff fair compensation.

WHEREFORE, the plaintiff prays for an order of the court adjudging that the defendant has inversely condemned the plaintiff's land and for judgment against the defendant for such amount as fair compensation for said tract as may be hereafter established at trial. The plaintiff further prays for its costs and attorneys' fees herein.

DATED April 23rd, 1987.

MONTGOMERY, PURDUE,
BLANKINSHIP & AUSTIN

By _____
JOHN D. BLANKINSHIP
Of Attorneys for Plaintiff

By _____
GALE D. BARBEE
Of Attorneys for Plaintiff

APPENDIX G

IN THE SUPERIOR COURT OF
WASHINGTON FOR KING COUNTY

PRESBYTERY OF SEATTLE, a Washington corporation, Plaintiff, vs. KING COUNTY, Defendant.	No. 87-2-07034-4 PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

The plaintiff moves as follows:

A. *Relief Requested.* Partial summary judgment. That King County Ordinance No. 7746 constitutes a taking of the plaintiff's property for which the plaintiff is entitled to just compensation to be determined in a future hearing.

B. *Statement of Facts.* On September 12, 1986, King County enacted Ordinance No. 7746 which adopted the Revised Federal Way Community Plan Zoning as the official zoning control for the lands referred to therein. The ordinance reclassified the plaintiff's property to a zoning which allows for five residential lots but preserves at least three of them to permanent open space in which any development is prohibited and even human access restricted. The impact of the ordinance makes use of the remaining two lots doubtful because of the provision in the ordinance that the Hylebos Wetland #18 may be increased "when either of the following exists within or

adjacent to the wetland buffer: (1) endangered, threatened or sensitive species; or (2) roads, utility rights-of-way, dikes, channels, etc."

C. *Statement of Issues.* Whether the ordinance constitutes a taking of the plaintiff's property contrary to the federal and state constitutions.

D. *Evidence Relied Upon.* Declaration of R.W. Thorpe to which are attached excerpts of the County Ordinance and of the Federal Way Community Plan and Area Zoning incorporated therein by reference.

E. *Legal Authority.* Memorandum attached.

F. *Proposed Order.* Copy attached.

DATED March ___, 1988.

MONTGOMERY, PURDUE,
BLANKINSHIP & AUSTIN

By /s/ Gale D. Barbee
Gale D. Barbee

By /s/ John D. Blankinship
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Attorneys for Plaintiff

Supreme Court, U.S.
FILED
SEP
JOSEPH F. SPANIOL, JR.
CLERK

(5)

No. 90-298

In The

Supreme Court of the United States

October Term, 1990

PRESBYTERY OF SEATTLE,

Petitioner,

v.

KING COUNTY,

Respondent.

On Petition For A Writ Of Certiorari To The Washington Supreme Court

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the decision of the Washington State Supreme Court that mere enactment of King County's wetland regulations did not constitute a taking is contrary to federal law.

2. Whether the decision of the Washington State Supreme Court that, absent any application for development permits, petitioner's claim that King County's wetland regulations inversely condemned its property was not ripe for adjudication is contrary to federal law.

3. Whether the Washington State Supreme Court's consideration of the entire parcel of property in analyzing petitioner's facial takings challenge to King County's wetland regulations was contrary to federal law.

4. Whether, in the absence of a final judgment on an application to develop petitioner's property, the Supreme Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

PARTIES TO THE PROCEEDING

Petitioner is Presbytery of Seattle. Respondent King County is a municipal corporation and political subdivision of the State of Washington. It is a home rule charter county created pursuant to art. XI, § 4 of the Washington State Constitution with police power in unincorporated King County.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE 2

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 7

REASONS WHY THE PETITION SHOULD BE DENIED 7

1. The decision of the Washington State Supreme Court is correct and does not conflict with any decision of this Court, other state courts of last resort or United States Court of Appeals 7

2. The Washington court's analysis of petitioner's regulatory takings challenge in relation to the entire parcel of property is consistent with federal precedent 10

3. In the absence of a final judgment on an application, the Supreme Court does not have jurisdiction to determine the constitutionality of the application of King County's wetland ordinances 12

CONCLUSION 13

TABLE OF AUTHORITIES

Page

CASES:

Agins v. City of Tiburon, 447 U.S. 255 (1980) 8, 9, 11

Allingham v. Seattle, 109 Wn.2d 947, 749 P.2d 160 (1988) 5, 11

First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987) 12

Hodel v. Irving, 481 U.S. 704 (1987)..... 11

Hodel v. Virginia Surface Mining and Reclamation Ass'n, 452 U.S. 264 (1981)..... 9

Keystone Bituminous Coal Ass'n. v. DeBenedictis, 480 U.S. 470 (1987) 9, 10, 11

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) 11

MacDonald, Sommer & Frates v. Yolo Cty., 477 U.S. 340 (1986).....9, 10, 12

Nectow v. City of Cambridge, 277 U.S. 183 (1928) 12

Orion Corp. v. State, 109 Wn.2d 621, 747 P.2d 1062 (1987), *cert. denied*, 108 S. Ct. 1996 (1988) 11

Penn Central Transportation Co. v. New York City, 438 U.S. 104, 130 (1978) 10, 11

Pennell v. City of San Jose, 108 S. Ct. 849 (1988)..... 9

Presbytery of Seattle v. King County, 114 Wn.2d 320, 787 P.2d 907 (1990).....1, 6, 7, 11

TABLE OF AUTHORITIES – Continued

Page

San Diego Gas & Elec. Co. v. San Diego, 450 U.S. 621 (1981) 12

Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172 (1985) 10

CONSTITUTION, STATUTES, REGULATIONS, AND ORDINANCES:

Fifth and Fourteenth Amendments to the United States Constitution 2, 7, 12

28 U.S.C. § 1257(a) ..... i, 2, 12

Art. XI, § 4 of the Washington State Constitution ii

Washington State Environmental Policy Act Chapter 43.21C Revised Code of Washington 2, 3

King County Ordinance 4365; Special Control Areas and Flood Hazard Areas (sensitive areas ordinance) 2, 3

King County Ordinance 7746; 1986 Federal Way Community Plan and Area Zoning Update 2, 3, 4

King County Code 21.54 3

No. 90-298

In The

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October Term, 1990

PRESBYTERY OF SEATTLE,

Petitioner,

v.

KING COUNTY,

Respondent.

On Petition For A Writ Of Certiorari To The Washington Supreme Court

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The decision of the Washington State Supreme Court is reported at 114 Wn.2d 320, 787 P.2d 907 (1990). Pet. App. A. The decision of the Washington State Court of Appeals, Division I, is an unpublished decision. Pet. App. B.

JURISDICTION

The petition for writ of certiorari was filed on August 15, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). To the extent petitioner seeks review of the application of King County's wetland regulations to its property, the Supreme Court lacks jurisdiction. No Washington court has rendered a final decision that any taking in violation of the federal or state constitutions has or has not occurred.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The federal constitutional provisions are the Fifth and Fourteenth Amendments to the United States Constitution. Pet. 2.

The wetland regulations at issue are the Washington State Environmental Policy Act, Chapter 43.21C Revised Code of Washington, App. 1-12; King County Ordinance 4365, Special Control Areas and Flood Hazard Areas (sensitive areas ordinance), App. 19-24; King County Ordinance 7746, the Federal Way Community Plan and Area Zoning Update, App. 27-34; Pet. App. E-1-8.

STATEMENT OF THE CASE

The Washington State Environmental Policy Act, chapter 43.21C Revised Code of Washington, was enacted by the Washington State Legislature in 1971 to protect the environment. App. 1-12.

In 1978 petitioner purchased a single family home located on four and one-half acres in the Federal Way area in King County for $60,000. At the time of purchase, the Hylebos Wetland No. 18, a class 1 rated unique and outstanding wetland, occupied approximately one-third of this property. It is a wetland of major environmental significance. App. 48-52; Pet. App. A-2-3.

In 1979 King County amended its sensitive areas ordinance, King County Code 21.54, to define areas of special concern, implement the policies of the State Environmental Policy Act of 1971 and ensure protection of environmentally sensitive areas. King County Ordinance 4365; App. 19-24. Wetlands are of special environmental concern and are protected by the state and King County. App. 14. Both the State Environmental Policy Act (SEPA) and King County's sensitive areas ordinance are an overlay to existing statutory authority and require analysis and consideration of environmental impacts. The purpose of King County's sensitive areas ordinance is specifically "to supplement the development requirements contained in the various use classifications." App. 17; 20. SEPA requires King County to analyze the environmental impacts of a proposal and authorizes King County to impose conditions or to deny approval on the basis of significant adverse environmental impacts. App. 3-7.

In 1980 the King County Council adopted the Federal Way Revised Community Plan and Area Zoning.[1] The

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[1] For comprehensive planning and zoning purposes, King County is divided into thirteen planning areas. Federal Way is

(Continued on following page)

1980 Federal Way Revised Community Plan and Area Zoning changed the zoning on petitioner's property from SR (Suburban Residential) to SE-P (Suburban Estates with development conditions). The SE zone allows churches as non-residential uses but limits the area of the lot that can be used for this purpose. App. 35-37; 39-47. The development conditions imposed by the 1980 plan were specifically designed to protect Hylebos Wetland No. 18. App. 14-16; 25-26.

In 1981, pursuant to King County's sensitive areas ordinance, King County conducted an inventory of the wetlands located in the western one-half of King County. The Hylebos Wetland No. 18 was rated a class 1 unique and outstanding wetland in King County's wetland inventory. Wetlands are rated class one if there is the presence of species recognized by the federal government or the State of Washington as endangered and the wetland is a sensitive and outstanding potential habitat for such species. App. 49-51. Hylebos Wetland No. 18 is approximately 12,000 years old, and is a complex wetland system containing an old growth cedar bog. It is one of the last major wetlands in Federal Way and is of major environmental significance in King County. Its ecosystem is critical to the maintenance and function of fish and wildlife. App. 50-52.

(Continued from previous page)

one of these planning areas. It covers approximately 22,000 acres and has a population of approximately 78,000. King County has adopted a community plan and area zoning for each of its thirteen planning areas to amplify and augment the County's comprehensive planning zoning. These community plans and area zoning are updated periodically in order to make allowances for population growth and other changing conditions.

In 1986 King County adopted another update of the Federal Way Community Plan and Area Zoning. It did not change the 1980 zoning designation on petitioner's property. The only change was to replace the previous development conditions imposed to protect the Hylebos Wetland No. 18 with new ones. These development conditions apply to all properties that are adjacent to or contain the Hylebos Wetland. App. 16; 27-34; 53. The conditions first require that wetland studies pursuant to King County's sensitive areas ordinance be prepared, that the wetland edge be identified, and that a wetland buffer to protect the environmental integrity of the Hylebos Wetland system be created. Other conditions relate to proposed alteration, restoration, water quality and protection requirements. Condition 4 prohibits the creation of building lots in the Hylebos Wetland. App. 16; 27-34; 53.

Having never applied for a permit to develop its property in any fashion, Presbytery sued King County alleging that King County's wetland regulations prevented it from using its land to build a church and parking lot or for any other economically reasonable or profitable use. Pet. App. F-1. Presbytery moved for partial summary judgment asking the court to rule that King County had inversely condemned its property. In support of its motion, petitioner relied on a theoretical residential subdivision development prepared by its expert. Pet. App. G-2; App. 18; 53-55. Based on *Allingham v. Seattle*, 109 Wn.2d 947, 749 P.2d 160 (1988), Presbytery argued that exhaustion of King County's administrative remedies would be futile and that a significant portion of its property had been converted by King County's ordinance to open space, which required just compensation.

In support of its cross-motion to dismiss the suit, King County presented evidence that a church and parking lot could be built on the property under King County's zoning code even with the wetland and that resort to the permit process was not futile because King County allows development in wetlands where application of its wetland ordinances "would deny all reasonable uses of the property." App. 24. The evidence presented indicated King County would be receptive to a development proposal that takes into consideration valid environmental concerns for the Hylebos Wetland. App. 17-18. Presbytery's theoretical residential subdivision development was flawed by the assumption that the Hylebos Wetland No. 18 did not exist on the property and a maximum number of building lots could be achieved by filling and building in the wetland. The more intensive residential subdivision development of the property posited by petitioner's expert would, in all likelihood, given the pre-existing wetland, be subject to review under SEPA and King County's wetland regulations. App. 17-18.

The trial court dismissed petitioner's lawsuit solely on the ground that it failed to exhaust its administrative remedies. In an unreported decision, Division I of the Court of Appeals affirmed the trial court's dismissal of petitioner's lawsuit on the ground that Presbytery's claims were not ripe for adjudication. Pet. App. B.

The Washington State Supreme Court upheld the decisions of the trial court and the Court of Appeals. *Presbytery of Seattle v. King County*, 114 Wn.2d 320, 787 P.2d 907 (1990). The holding of the Washington Supreme Court in *Presbytery* is very limited and narrow. The court held (1) that Presbytery had not carried its burden of

showing that the enactment of King County's wetland regulations had denied it all economically viable use of its property and (2) that Presbytery's claim that King County's regulations as applied was an unconstitutional taking was not ripe for adjudication until an application of a developmental proposal had been pursued and finally determined. Pet. App. A-17-23.

SUMMARY OF ARGUMENT

The Washington State Supreme Court's decision in *Presbytery of Seattle*, 114 Wn.2d 320, 787 P.2d 320 (1990) is consistent with federal law. To the extent the court engaged in any discussion arguably contrary to federal law, it played no role in the court's decision.

REASONS WHY THE PETITION SHOULD BE DENIED

1. The decision of the Washington State Supreme Court is correct and does not conflict with any decision of this Court, other state courts of last resort or United States Court of Appeals.

Contrary to petitioner's assertions, the Washington court did not reject its compensation claim. The court did not decide that petitioner was not entitled to compensation due to its failure to surmount some threshold inquiry. The Washington court did not decide whether application of King County's regulations to petitioner's property was a taking in violation of the Fifth and Fourteenth Amendments. The entire focus of the petition for

writ of certiorari is dicta in which the Washington court articulates but does *not* apply the relative applicability, standards, and remedies of the taking and substantive due process limitations. The court's dicta did not govern the holding of the case. The court held (1) that petitioner failed to carry its burden of proving that the enactment of King County's wetland regulations did not substantially advance legitimate state interests or deny economically viable use of its property and (2) that petitioner's taking challenge was not ripe for adjudication.

The decision of the Washington court that petitioner had not successfully carried its burden of showing that King County's adoption of wetland regulations constituted a taking is consistent with federal law.[2] Since it is undisputed that petitioner has never applied to develop its property for a church or any other use, the Washington court only considered petitioner's constitutional challenge to the enactment of its wetland regulations. Pet. App. A-14, A-18-19.

Using the exact standards set forth in *Agins v. City of Tiburon*, 447 U.S. 255 (1980), the Washington court concluded, based on the record, that King County's regulations substantially advanced legitimate state interests and "that the landowner has not carried the burden of showing that the regulation denies it all economically viable use of any parcel of regulated property." Pet. App. A-19. The evidence presented by King County clearly established the ecological and environmental significance of

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[2] The Washington court's decision is also consistent with the state court and United States Court of Appeals cases cited by petitioner. Pet. 16-17.

seeking to protect significant wetlands and that it was receptive to considering proposals for development. App. 48-55; 17-24. The Washington court's conclusion is consistent with federal law. *Keystone Bituminous Coal Ass'n. v. DeBenedictis*, 480 U.S. 470 (1987); *Hodel v. Virginia Surface Mining and Reclamation Ass'n*, 452 U.S. 264 (1981); *Agins v. Tiburon*, 447 U.S. 255 (1980).[3]

The Washington court's decision that petitioner's constitutional challenge to the application of King County's regulations was not ripe for adjudication is also consistent with federal law.

A number of factors must be analyzed in order to determine the economic effect that regulations have on the property and an owner's reasonable investment-backed expectations with respect to the property in an "as applied" takings challenge. Given the nature of this inquiry, whether a regulatory taking has occurred is a question that cannot be made without a final decision as to how the challenged regulations apply to the landowner's property. *MacDonald, Sommer & Frates v. Yolo*

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[3] The Washington court entertained petitioner's facial challenge to King County's regulations without requiring exhaustion of administrative remedies. *Keystone*, 480 U.S. 47 (1987); *Hodel v. Virginia Surface Mining*, 452 U.S. 264 (1981). In the recent case of *Pennell v. City of San Jose*, 108 S. Ct. 849 (1988), the Court rejected as premature a facial regulatory taking challenge to a rent-control ordinance. The Court held the facial challenge was non-justiciable without a final decision of the regulatory burden imposed. Thus, even though the Supreme Court may have required exhaustion of administrative remedies, the Washington Supreme Court was not as strict and did not.

Cty., 477 U.S. 340 (1986); *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985). "Our cases uniformly reflect an insistence on knowing the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limited." *MacDonald, Sommer & Frates*, 477 U.S. at 351 (1986).

The Washington court affirmed the conclusion of the trial court and the court of appeals that petitioner's claim was not ripe for adjudication. "Because the landowner has not yet sought any development permits, it is not possible to know what effect SEPA and other applicable regulations might have on the property in question." Pet. App. A-22. This holding is consistent with federal law. *Keystone*, 480 U.S. 470 (1987); *MacDonald, Sommer & Frates*, 477 U.S. 340 (1986); *Williamson County*, 473 U.S. 172 (1985).

2. The Washington court's analysis of petitioner's regulatory takings challenge in relation to the entire parcel of property is consistent with federal precedent.

The principle that a constitutional taking challenge should be determined by evaluating the parcel as a whole was reaffirmed in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 130 (1978), and definitively explained in *Keystone*, 480 U.S. 470, 488-502 (1987).[4]

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[4] " 'Taking' jurisprudence does not divide a single parcel into discrete segments and and attempt to determine whether rights in a particular segment have been entirely abrogated." *Penn Central*, 438 U.S. at 130.

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Washington regulatory taking decisions have consistently followed this principle. *Orion Corp. v. State*, 109 Wn.2d 621, 747 P.2d 1062 (1987), *cert. denied*, 108 S. Ct. 1996 (1988).[5] The Court has not analyzed regulatory taking challenges by only looking at the regulated portion of the property. *Keystone Bituminous Coal Assoc. v. DeBenedictis; Penn Central Transportation Co. v. New York City.*

The cases petitioner relies on, *Hodel v. Irving*, 481 U.S. 704 (1987) and *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), use different criteria than regulatory taking cases that restrict development. In these cases, which concern regulations that deprive an owner of a fundamental attribute of ownership or a physical occupation of property, no exhaustion of administrative remedies is required and no economic analysis is necessary. *Hodel v. Irving*, 481 U.S. 704 (1987); *Loretto v.*

(Continued from previous page)

In *Keystone*, the Court stated that "Although these verbal formulations do not solve all the definitional issues that may arise and define the relevant mass of property, they do provide sufficient guidance to compel us to reject petitioner's argument" and that its "takings jurisprudence forecloses reliance on such legalistic distinctions within a bundle of rights." *Keystone*, 480 U.S. at 497, 500.

[5] *Allingham v. City of Seattle*, 109 Wn.2d 947, 749 P.2d 169, *modified*, 757 P.2d 533 (1988), was an exception that was explicitly overruled in *Presbytery of Seattle v. King County*, 114 Wn.2d 320, 787 P.2d 907 (1990). In *Allingham* the test of *Agins v. City of Tiburon* was restated to mean deprivation of any profitable use of "a substantial portion" of the land. *Allingham*, 109 Wn.2d at 952. The Washington court took the opportunity in *Presbytery of Seattle v. King County* to unanimously overrule this analysis and reiterate its adherence to federal law. Pet. App. A-15-16.

Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987) (Stevens, J., dissenting). On the other hand, regulations that restrict the use and development of property require an economic analysis in order to determine the nature of the use, the economic effect that the regulations would have on the value of the property and on the owner's reasonable investment-backed expectations with respect to the property.[6]

3. In the absence of a final judgment on an application, the Supreme Court does not have jurisdiction to determine the constitutionality of the application of King County's wetland ordinances.

28 U.S.C. § 1257(a) grants jurisdiction to the Supreme Court to review final judgments. There has been no final decision as to whether application of King County's regulations to petitioner's property violated the Fifth and Fourteenth Amendments. Since there has been no application to develop the property, there is no final judgment. The court lacks jurisdiction to decide the constitutionality of the application of King County's ordinances to petitioner's property. *San Diego Gas & Elec. Co. v. San Diego*, 450 U.S. 621 (1981); *MacDonald, Sommer & Frates*, 477 U.S. 340 (1986).

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[6] Petitioner also cites and relies on *Nectow v. City of Cambridge*, 277 U.S. 183 (1928). The court in *Nectow* held that the zoning ordinances applied to plaintiff's land violated substantive due process.

CONCLUSION

The petition for a writ of certiorari should be denied.

DATED: September 1990.

Respectfully submitted,

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Senior Deputy Prosecuting
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APPENDIX A

Chapter 43.21C RCW
STATE ENVIRONMENTAL POLICY

RCW 43.21C.010 Purposes. The purposes of this chapter are: (1) To declare a state policy which will encourage productive and enjoyable harmony between man and his environment; (2) to promote efforts which will prevent or eliminate damage to the environment and biosphere; (3) and stimulate the health and welfare of man; and (4) to enrich the understanding of the ecological systems and natural resources important to the state and nation. [1971 ex.s. c 109 § 1.]

RCW 43.21C.020 Legislative recognitions – Declaration – Responsibility. (1) The legislature, recognizing that man depends on his biological and physical surroundings for food, shelter, and other needs, and for cultural enrichment as well; and recognizing further the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource utilization and exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the state of Washington, in cooperation with federal and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to: (a) Foster and promote the general welfare; (b) to create and maintain conditions under which man

and nature can exist in productive harmony; and (c) fulfill and social, economic, and other requirements of present and future generations of Washington citizens.

(2) In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the state of Washington and all agencies of the state to use all practicable means, consistent with other essential considerations of state policy, to improve and coordinate plans, functions, programs, and resources to the end that the state and its citizens may:

(a) Fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(b) Assure for all people of Washington safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(c) Attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(d) Preserve important historic, cultural, and natural aspects of our national heritage;

(e) Maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(f) Achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(g) Enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(3) The legislature recognizes that each person has a fundamental and inalienable right to a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment. [1971 ex.s. c 109 § 2.]

RCW 43.21C.030 Guidelines for state agencies, local governments – Statements – Reports – Advice – Information. The legislature authorizes and directs that, to the fullest extent possible: (1) The policies, regulations, and laws of the state of Washington shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all branches of government of this state, including state agencies, municipal and public corporations, and counties shall:

(a) Utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision making which may have an impact on man's environment;

(b) Identify and develop methods and procedures, in consultation with the department of ecology and the ecological commission, which will insure that presently unquantified environmental amenities and values will be given appropriate consideration in decision making along with economic and technical considerations;

(c) Include in every recommendation or report on proposals for legislation and other major actions, significantly affecting the quality of the environment, a detailed statement by the responsible official on:

(i) the environmental impact of the proposed action;

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented;

(iii) alternatives to the proposed action;

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity; and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented;

(d) Prior to making any detailed statement, the responsible official shall consult with and obtain the comments of any public agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate federal, province, state, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the governor, the department of ecology, the ecological commission, and the public, and shall accompany the proposal through the existing agency review processes;

(e) Study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(f) Recognize the world-wide and long-range character of environmental problems and, where consistent with state policy, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(g) Make available to the federal government, other states, provinces of Canada, municipalities, institutions,

and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(h) Initiate and utilize ecological information in the planning and development of natural resource-oriented projects. [1971 ex.s. c 109 § 3.]

RCW 43.21C.031 Significant impacts. An environmental impact statement (the detailed statement required by RCW 43.21C.030(2)(c)) shall be prepared on proposals for legislation and other major actions having a probable significant, adverse environmental impact. Actions categorically exempt under RCW 43.21C.110(1)(a) do not require environmental review or the preparation of an environmental impact statement under this chapter.

An environmental impact statement is required to analyze only those probable adverse environmental impacts which are significant. Beneficial environmental impacts may be discussed. The responsible official shall consult with agencies and the public to identify such impacts and limit the scope of an environmental impact statement. The subjects listed in RCW 43.21C.030(2)(c) need not be treated as separate sections of an environmental impact statement. Discussions of significant short-term and long-term environmental impacts, significant irrevocable commitments of natural resources, significant alternatives including mitigation measures, and significant environmental impacts which cannot be mitigated should be consolidated or included, as applicable, in those sections of an environmental impact statement where the responsible official decides they logically belong. [1983 c 117 § 1.]

* * *

RCW 43.21C.060 Chapter supplementary – Conditioning or denial of governmental action. The policies and goals set forth in this chapter are supplementary to those set forth in existing authorizations of all branches of government of this state, including state agencies, municipal and public corporations, and counties. Any governmental action may be conditioned or denied pursuant to this chapter: *Provided,* That such conditions or denials shall be based upon policies identified by the appropriate governmental authority and incorporated into regulations, plans, or codes which are formally designated by the agency (or appropriate legislative body, in the case of local government) as possible bases for the exercise of authority pursuant to this chapter. Such designation shall occur at the time specified by RCW 43.21C.120. Such action may be conditioned only to mitigate specific adverse environmental impacts which are identified in the environmental documents prepared under this chapter. These conditions shall be stated in writing by the decisionmaker. Mitigation measures shall be reasonable and capable of being accomplished. In order to deny a proposal under this chapter, an agency must find that: (1) The proposal would result in significant adverse impacts identified in a final or supplemental environmental impact statement prepared under this chapter; and (2) reasonable mitigation measures are insufficient to mitigate the identified impact. Except for permits and variances issued pursuant to chapter 90.58 RCW, when such a governmental action, not requiring a

legislative decision, is conditioned or denied by a non-elected official of a local governmental agency, the decision shall be appealable to the legislative authority of the acting local governmental agency unless that legislative authority formally eliminates such appeals. Such appeals shall be in accordance with procedures established for such appeals by the legislative authority of the acting local governmental agency. [1983 c 117 § 3; 1977 ex.s. c 278 § 2; 1971 ex.s. c 109 § 6.]

RCW 43.21C.075 Appeals. (1) Because a major purpose of this chapter is to combine environmental considerations with public decisions, any appeal brought under this chapter shall be linked to a specific governmental action. The State Environmental Policy Act provides a basis for challenging whether governmental action is in compliance with the substantive and procedural provisions of this chapter. The State Environmental Policy Act is not intended to create a cause of action unrelated to a specific governmental action.

(2) Unless otherwise provided by this section:

(a) Appeals under this chapter shall be of the governmental action together with its accompanying environmental determinations.

(b) Appeals of environmental determinations made (or lacking) under this chapter shall be commenced within the time required to appeal the governmental action which is subject to environmental review.

(3) If an agency has a procedure for appeals of agency environmental determinations made under this chapter, such procedure:

(a) Shall not allow more than one agency appeal proceeding on a procedural determination (the adequacy

of a determination of significance/nonsignificance or of a final environmental impact statement), consistent with any state statutory requirements for appeals to local legislative bodies. The appeal proceeding on a determination of significance/nonsignificance may occur before the agency's final decision on a proposed action. Such an appeal shall also be allowed for a determination of significance/nonsignificance which may be issued by the agency after supplemental review;

(b) Shall consolidate appeal of procedural issues and of substantive determinations made under this chapter (such as a decision to require particular mitigation measures or to deny a proposal) by providing for simultaneous appeal of an agency decision on a proposal and any environmental determinations made under this chapter, with the exception of the threshold determination appeal as provided in (a) of this subsection or an appeal to the local legislative authority under RCW 43.21C.060 or other applicable state statutes;

(c) Shall provide for the preparation of a record for use in any subsequent appeal proceedings, and shall provide for any subsequent appeal proceedings to be conducted on the record, consistent with other applicable law. An adequate record consists of findings and conclusions, testimony under oath, and taped or written transcript. An electronically recorded transcript will suffice for purposes of review under this paragraph; and

(d) Shall provide that procedural determinations made by the responsible official shall be entitled to substantial weight.

(4) If a person aggrieved by an agency action has the right to judicial appeal and if an agency has an appeal

procedure, such person shall, prior to seeking any judicial review, use such procedure if any such procedure is available, unless expressly provided otherwise by state statute.

(5) RCW 43.21C.080 establishes an optional "notice of action" procedure which, if used, imposes a time period for appealing decisions under this chapter. Some statutes and ordinances contain time periods for challenging governmental actions which are subject to review under this chapter, such as various local land use approvals (the "underlying governmental action"). This section does not modify any such time periods. This section governs when a judicial appeal must be brought under this chapter where a "notice of action" is used, and/or where there is another time period which is required by statute or ordinance for challenging the underlying governmental action. In this subsection, the term "appeal" refers to a judicial appeal only.

(a) If there is a time period for appealing the underlying governmental action, appeals under this chapter shall be commenced within thirty days. The agency shall give official notice stating the date and place for commencing an appeal. If there is an agency proceeding under subsection (3) of this section, the appellant shall, prior to commencing a judicial appeal, submit to the responsible official a notice of intent to commence a judicial appeal. This notice of intent shall be given within the time period for commencing a judicial appeal on the underlying governmental action.

(b) A notice of action under RCW 43.21C.080 may be used. If a notice of action is used, judicial appeals shall be commenced within the time period specified by RCW

43.21C.080, unless there is a time period for appealing the underlying governmental action in which case (a) of this subsection shall apply.

(c) Notwithstanding RCW 43.21C.080(1), if there is a time period for appealing the underlying governmental action, a notice of action may be published within such time period.

(6)(a) Judicial review of an appeal decision made by an agency under RCW 43.21C.075(5) shall be on the record, consistent with other applicable law.

* * *

(c) Judicial review under this chapter shall without exception be of the governmental action together with its accompanying environmental determinations.

(7) Jurisdiction over the review of determinations under this chapter in an appeal before an agency or superior court shall upon consent of the parties be transferred in whole or part to the shorelines hearings board. The shorelines hearings board shall hear the matter and sign the final order expeditiously. The superior court shall certify the final order of the shorelines hearings board and said certified final order may only be appealed to an appellate court.

(8) For purposes of this section and RCW 43.21C.080, the words "action", "decision", and "determination" mean substantive agency action including any accompanying procedural determinations under this chapter (except where the word "action" means "appeal" in RCW 43.21C.080(2) and (3)). The word "action" in this section and RCW 43.21C.080 does not mean a procedural determination by itself made under this chapter. The

word "determination" includes any environmental document required by this chapter and state or local implementing rules. The word "agency" refers to any state or local unit of government. The word "appeal" refers to administrative, legislative, or judicial appeals.

(9) The court in its discretion may award reasonable attorney's fees of up to one thousand dollars in the aggregate to the prevailing party, including a governmental agency, on issues arising out of this chapter if the court makes specific findings that the legal position of a party is frivolous and without reasonable basis. [1983 c 117 § 4.]

* * *

RCW 43.21C.135 Authority of local governmental units to adopt rules, guidelines and model ordinances by reference. (1) All public and municipal corporations, political subdivisions, and counties of the state are authorized to adopt rules, ordinances, and resolutions which incorporate any of the following by reference to the appropriate sections of the Washington Administrative Code:

(a) Rules and guidelines adopted under RCW 43.21C.110(1) in accordance with the administrative procedure act, chapter 34.04 RCW;

(b) Model ordinances adopted by the department of ecology under RCW 43.21C.130 in accordance with the administrative procedure act, chapter 34.04 RCW.

(2) If any rule, ordinance, or resolution is adopted by reference pursuant to subsection (1) of this section, any publication of such rule, ordinance, or resolution shall be accompanied by a summary of the contents of the sections of the Washington Administrative Code referred

to. Such summaries shall be provided to the adopting units of local government by the department of ecology: *Provided,* That any proposal for a rule, ordinance or resolution which would adopt by reference rules and guidelines or model ordinances pursuant to this section shall be accompanied by the full text of the material to be adopted which need not be published but shall be maintained on file for public use and examination.

(3) Whenever any rule, ordinance, or resolution is adopted by reference pursuant to subsection (1) of this section, the corporation, political subdivision, or county of the state adopting the rule, ordinance, or resolution shall maintain on file for public use and examination not less than three copies of the sections of the Washington Administrative Code referred to. [1975-'76 2nd ex.s. c 99 § 1.]

APPENDIX B

SUMMARY JUDGMENT MOTION SET FOR:
Wednesday, April 20, 1988

SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR KING COUNTY

PRESBYTERY OF SEATTLE, A Washington corporation Plaintiff, v. KING COUNTY, Defendant.	)	NO. 87-2-07034-4 AFFIDAVIT OF BRYAN GLYNN
STATE OF WASHINGTON COUNTY OF KING	)	ss.

Bryan Glynn, being first duly sworn on oath deposes and states as follows:

1. I am the Manager of the Building and Land Development Division and I make this affidavit on my own personal knowledge.

2. As the Manager of the Building and Land Development Division (hereinafter "BALD") I am responsible for the administration of the County building, housing, fire, energy, shoreline, zoning and subdivision codes and the issuance of land development permits. One of the important functions of BALD is to administer the land development permitting process, including the intake,

review and issuance of permits pursuant to adopted laws and policies.

3. I have reviewed the complaint for damages for inverse condemnation filed in Presbytery of Seattle v. King County, King County Superior Court Cause No. 87-2-07034-4 and the Declaration of R. W. Thorpe, particularly attachments B and C. In addition I have reviewed the BALD records to ascertain whether Presbytery of Seattle has made any application for development for the property described in its complaint for damages for inverse condemnation.

4. On part of the property that is the subject of this lawsuit is the Hylebos Wetland No. 18. The wetland is a Class 1 unique and outstanding wetland. Wetlands are of special environmental concern and are protected by both the state through the State Environmental Policy Act, RCW 43.21C, and the County through its sensitive areas ordinance, King County Code 21.54. Exhibit 1. SEPA was enacted in 1971 and the sensitive areas ordinance in 1979. Both SEPA and the sensitive areas ordinance would have applied to any development on plaintiff's property before 1980. A review of the Kroll map, an index of all property in King County, indicates that the Hylebos Wetland No. 18 is on approximately one-third of Presbytery of Seattle's property.

5. In 1980 the King County Council adopted the Federal Way Revised Community Plan and Area Zoning. It changed the zoning on plaintiff's property from SR (suburban residential) to SE-P. The SE-P zoning desigation [sic] means this property is classified as suburban estate with development conditions to protect Hylebos

Wetland No. 18. An SE zoning designation allows single family residential and other uses including churches. Exhibits 4 and 5. According to the 1980 plan, the P-suffix development conditions were adopted:

> Because of the size and significance of the west Hylebos headwater wetland, a policy of the revised Federal Way Community Plan requires site plan review for any development within the rectangular area bounded by Pacific Highway South on the East, 348th Street South on the North, 1st Avenue South on the West and 356th Street South on the South.

In the 1980 Federal Way Community Plan and Area Zoning the following P-suffix site development conditions were adopted to protect the Hylebos wetlands and apply to all development pursuant to the 1980 Federal Way Community Plan and Area Zoning:

> 1. 200 foot setback from the main January high water mark or plus 10 feet elevation above the main January high water mark, whichever is greater.
>
> 2. Natural vegetation within setback area to be kept.
>
> 3. No fill below the 210 foot contour line.
>
> 4. No sewer facilities, including lines serving adjacent areas, within areas defined by the January high water mark.
>
> 5. Development upland of 210 foot contour line to use holding ponds and catch basins to keep run off peak to current level and to trap pollutants. These ponds and catch basins shall either be sufficiently biologically active to biodegrade the pollutants, or be periodically cleaned.

The adopted policies that were the basis for the 1980 plan also required that special studies be prepared pursuant to King County's sensitive areas ordinance. Exhibit 2, Federal Way Revised Community Plan and Area Zoning, pages 54 and 55.

6. In 1986 the King County Council adopted the updated Federal Way Community Plan and Area Zoning. The zoning on Presbytery's property continued to be the same; SE-P. The only change was to replace the wetland-related development conditions established in 1980 with the wetland protection conditions established during the plan update and adopted by Federal Way Community Plan and Area Zoning, Ordinance 7746 on September 2, 1986. The 1986 Hylebos Wetland No. 18 development conditions were adopted to protect the Hylebos Wetland and apply to all development on this site. Exhibit 3, 1986 Federal Way Community Plan and Area Zoning, pages 4 to 11. The first three development conditions require that wetland studies be prepared and the wetland edge identified for all developments that would potentially impact Hylebos Wetland No. 18.

The wetland boundary edge identified in the Federal Way Community Plan and Area Zoning is clearly an approximate line. Until a study is done and the wetland edge marked and identified on a given site by BALD's wetland planner (or an approved properly qualified consultant), it is not clear where the wetland is and where the 100 foot buffer would be. To my knowledge, no such studies have been done on this property. R. W. Thorpe's representation of the wetland boundaries on this property in his attachment C are not based on BALD's analysis or review as required by King County's ordinances.

7. In addition to the application of the Federal Way Community Plan and Area Zoning development conditions to protect the Hylebos Wetland, King County's sensitive areas ordinance, King County Code 21.54, King County's environmental procedures, King County Code 20.44, and the State Environmental Policy Act (SEPA) RCW 43.21C, must be applied to any development on this property. The SE-P classification is construed in the context of King County's sensitive areas ordinance and the State Environmental Policy Act. The purpose of King County's sensitive areas ordinance is specifically "to supplement the development requirements contained in the various use classifications". The purpose of the state mandated State Environmental Policy Act is to protect the environment. SEPA requires King County to analyze the environmental impacts of a proposal and make a threshold determination of significance before any action can be taken. If a determination is made that the project would have significant environmental impacts, an environmental impact statement must be prepared. SEPA authorizes King County to impose conditions or deny approval on the basis of significant environmental impacts.

8. To my knowledge there has been no application made by Presbytery of Seattle to develop its property for a church or any other purpose. BALD has not, therefore, had the opportunity to apply the development conditions as required by the Federal Way Community Plan and Area Zoning and do a wetland study, identify the wetland edge or buffer, and apply the conditions and King County Code 21.54. Nor has any application been subjected to a SEPA determination. Without doing so, BALD is not in a position to determine the effect of SEPA, the

Federal Way Community Plan and Area Zoning and King County Code 21.54 on this property.

9. According to Presbytery of Seattle's complaint this property was acquired for the purpose of building a church. Even though no application for such development has been made, a church and parking lot could potentially be built pursuant to King County's zoning code. Exhibits 4 and 5; King County Code 21.18 and 21.08.

10. Mr. Thorpe's basic assumption in his declaration and theoretical building scheme seems to be that this site consists of dry, buildable land. This assumption ignores the existence of Hylebos Wetland No. 18 on the property. Given the existing environmental condition it is certainly clear that the maximum number of building lots under the zoning code could not be achieved. Moreover, in all likelihood, in order to carry out Mr. Thorpe's scheme of five building sites Hylebos Wetland No. 18 would be adversely affected contrary to SEPA, King County's sensitive areas ordinance, and Ordinance 7746. King County is mandated by the state and its own ordinances to protect wetlands; not to allow them to be altered to maximize development potential.

11. Before the adoption of Ordinance 7746, the development conditions of the previous Federal Way Community Plan and Area Zoning, SEPA, and the sensitive areas ordinance applied to plaintiff's property. It is not clear that plaintiff's ability to develop its property has been affected at all by the adoption of Ordinance 7746. However, without an application being filed and reviewed BALD cannot make a determination about this.

/s/ Bryan Glynn
BRYAN GLYNN

SUBSCRIBED AND SWORN to before me this 12th day of April, 1988.

/s/ Ann Schindler
Notary Public in and for the State of Washington, residing at Kitsap County
My Commission Expires: June 1988.

EXHIBIT 1

* * *

Chapter 21.54
SPECIAL CONTROL AREAS AND FLOOD HAZARD AREAS

Sections:

21.54.010 Purpose.
21.54.020 Regulations subject to chapter.
21.54.030 Maps adopted.
21.54.040 Interim flood hazard areas.
21.54.050 Flood hazard area – Purpose.
21.54.060 Limitation on uses in floodway.
21.54.070 Limitation on uses in floodway fringe.
21.54.080 Permits and licenses – Approval required.
21.54.090 Permits and licenses – Procedural requirements.
21.54.100 Permits and licenses – Appeal from decision.
21.54.110 Authority.

21.54.120 Information to be obtained and maintained.
21.54.130 Sensitive areas – Purpose.
21.54.140 Sensitive areas – Mapping.
21.54.150 Sensitive areas – Permit issuance.
21.54.160 Sensitive areas – Class III landslide hazard area.
21.54.170 Sensitive areas – Wetlands.
21.54.180 Sensitive areas – Coal mine hazard area – Restrictions.
21.54.190 Sensitive areas – Coal mine hazard area – Additional provisions.

21.54.010 Purpose. The purpose of this general provision is to determine areas of special concern and to supplement the development requirements contained in the various use classifications by providing for additional controls in critical areas where public safety requires or where planned development is necessary. (Ord. 1527 § 1, 1973).

21.54.020 Regulations subject to chapter. The foregoing regulations of this title pertaining to the several classifications shall be subject to the general provisions, conditions and exceptions contained in this chapter. (Ord. 1527 § 2, 1973).

21.54.030 Maps adopted. Areas of special concern may be shown and defined on zoning maps which shall become a part of this title by adoption by the county council subject to the provisions of Chapters 21.60 and 21.62. (Ord. 1527 § 3, 1973).

* * *

21.54.130 Sensitive areas – Purpose. King County has areas of special concern in addition to the flood hazard

areas as defined in Section 21.04.148 and this chapter, which together comprise sensitive areas. The purposes of Sections 21.54.130 through 21.54.180 are:

A. To protect sensitive areas by regulating their development;

B. To protect the public from damage due to landslide, subsidence, or erosion;

C. To minimize turbidity and pollution of wetlands and fish-bearing waters and to maintain wildlife habitat;

D. To protect the public against avoidable losses from:

1. Maintenance and replacement of public facilities,
2. Property damage,
3. Subsidy cost of public mitigation of avoidable impacts,
4. Cost for public emergency rescue and relief operations;

E. To alert appraisers, assessors, owners, potential buyers and lessees of the natural limitations of the sensitive areas;

F. To provide responsible officials with information to condition or deny public or private projects to protect sensitive areas; and to avoid the necessity of preparing environmental impact statements in cases where there will not be significant adverse environmental effects, thus expediting governmental approval processes;

G. To protect unique, fragile and valuable elements of the environment;

H. To implement the policies of the State Environmental Policy Act of 1971. (Ord. 4365 § 8, 1979).

21.54.140 Sensitive areas – Mapping. The distribution of environmentally sensitive areas in western King

County is displayed in maps published by the department of planning and community development in the Sensitive Areas Map Folio, as now or hereafter updated and supplemented. These maps are adopted by reference and shall be used by the department to alter the public and responsible officials to the potential presence of sensitive areas on the sites of development proposals. In cases of a mapping error, the actual presence or absence of the features defined in KCC 21.04 as sensitive areas, as determined by qualified professional and technical persons, shall govern the treatment of an individual building site or parcel of land as a sensitive area. (Ord. 4365 § 9, 1979).

21.54.150 Sensitive areas – Permit issuance. A. Whenever a proposed development requires a building permit, grading permit, shoreline substantial development permit, conditional use permit, unclassified use permit, variance, rezone, planned unit development, subdivision or short subdivision, and one or more of the sensitive areas, as defined in KCC 21.04, is present on the site of the proposed development, the manager of the building and land development division may require special studies by qualified professionals as provided in Sections 21.54.130 through 21.54.180. The manager shall send written notification to the applicant whenever such studies are required. The county may approve with conditions or deny any such proposal to carry out the purposes of this ordinance, the policies of the King County Comprehensive Plan, and other adopted county plans, policies and regulations.

B. Whenever an erosion hazard area, Class III seismic hazard area, or fish-bearing waters are present, soil,

geology, erosion and deposition, hydrology and/or water quality studies may be required if there is a reasonable possibility of significant erosion, landsliding, or seismic hazard or of damage to fish populations.

C. Any determination to require a study or any decision to approve with conditions or deny a building permit, grading permit, conditional use permit, variance, or short subdivision pursuant to this ordinance may be appealed in writing to the zoning and subdivision hearing examiner within ten days of written notification of such determination or decision. The hearing examiner shall hold a public hearing and consider the appeal pursuant to KCC Chapter 20.24; provided, that the decision of the hearing examiner regarding a requirement for studies shall be final. Any appeal filed pursuant to this section for actions relating to a building permit or short plat application shall be scheduled for public hearing and acted upon by the county as expeditiously as practicable.

D. Where studies may be required for building permit applications by an owner, lessee, or contract purchaser to construct a single family dwelling for his or her own use or applications for a short subdivision into two residential building lots, King County shall do a preliminary field investigation to determine the need for further studies or mitigating conditions. (Ord. 4365 § 10, 1979).

* * *

21.54.160 Sensitive areas – Wetlands. Wetlands located on the site of a proposed development requiring a building permit, grading permit, shoreline substantial development permit, conditional use permit, unclassified use permit, variance, rezone, planned unit development,

subdivision or short subdivision shall not be disturbed or altered through excavation, filling, building, or other improvements unless King County determines, upon review of special studies completed by qualified professionals, that either:

A. the wetland does not serve any of the valuable functions of wetlands identified in section 20.12.080 and Army Corps of Engineers 33 CFR 320.4(b), including but not limited to wildlife habitat and natural drainage functions; or

B. the proposed development would preserve or enhance the wildlife habitat, natural drainage, and/or other valuable functions of wetlands as discussed in Section 20.12.080 or Army Corps of Engineers 33 CFR 320.4(b) and would be consistent with the purposes of this title. The required studies may include habitat value, hydrology, erosion and deposition, and/or water quality studies. Such studies shall include specific recommendations for mitigating measures which should be required as a condition of any approval for such development. The recommendations may include, but are not limited to, construction techniques, or design, drainage, or density specifications. The manager of the Building and Land Development Division may waive the requirement for special studies where sufficient information is otherwise available to approve, approve with conditions, or deny the development permit or approval in accordance with these criteria and the purposes of this title. If the application of this section would deny all reasonable uses of a property, development may be allowed which is consistent with the general purposes of this title and the public interest. (Ord. 4365 § 12, 1979).

* * *

EXHIBIT 2

W 20-21-4

SR to SE-P

This change in zone classification establishes a minimum lot size of 35,000 square feet. The following density factors apply to this area:

* The King County Sensitive Areas Study, along with field surveys, is a guide for determining which areas contain potential environmental problems and is an important factor in recommending density. Density Factor 2.a.

* The unique character of certain wetland areas in Federal Way is so precious to the present and future community that even a low density designation is not adquate [sic] to protect this asset from adverse effects of development. Thus, special provisions to prohibit or limit development in such areas are needed. Density Factor 2.b.

* A low density designation is considered as an additional means to limit the amount and rate of surface water runoff and soil erosion into the Green River Valley and within the Hylebos Creek Drainage basin. Density Factor 2.c.

* Existing lot size is an important factor in recommending density. Density Factor 3.d.

* The compatibility of adjacent land uses is an important factor in recommending density. Density Factor 3.e.

* Urban design and aesthetics are important to the community and affected by density. Low density designations are made in portions of

Federal Way as a means of protecting a rural character, preserving a visual image of trees and protecting the edges of the Federal Way community. Density Factor 3.g.

* The King County Comprehensive Plan's intent to consider neighborhood characteristics and community sentiment in determining the appropriate level of density is reaffirmed. (King County Comprehensive Plan, 1964, D. 8-9) Density Factor 4.a.

P-Suffix site conditions for this area are outlined below.

SR to SE-P, FR to FR-P, SE to SE-P

Because of the size and significance of the West Hylebos Headwater Wetland, a policy of the revised Federal Way Community Plan requires site plan review for any development within the rectangular area bounded by Pacific Highway South on the east, 348th Street South on the north, 1st Avenue South on the west and 356th Street South on the south. The following P-Suffix site development conditions apply:

1. 200 foot setback from the mean January high water mark or plus 10 feet elevation above the mean January high water mark, which ever is greater.
2. Natural vegetation within setback area to be kept.
3. No fill below the 210 foot contour line.
4. No sewer facilities, including lines serving adjacent areas, within area defined by the January high water mark.
5. Development upland of 210 foot contour line to use holding ponds and catch basins to keep runoff peak to current level and to trap pollutants. These ponds and catch

basins shall either be sufficiently biologically active to biodegrade the pollutants, or must be periodically cleaned.

EXHIBIT 3

* * *

B. SENSITIVE AREAS ARE IDENTIFIED AND PROTECTED

Federal Way has many unique natural features that serve important biological and cultural functions. Many of these areas are protected by the King County Sensitive Areas Ordinance, KCC 21.54. They include Class III Landslide Hazards, Class III Seismic Hazards, Erosion Hazards, Wetlands, Anadromous Fish-bearing Waters, 100-year Floodplains and Coal Mine Hazards. They are mapped in the *Sensitive Areas Map Folio* available at King county Planning Division offices. (The map folio generally locates those sensitive areas identified through an inventory process completed in 1981. On a case-by-case basis, further site investigation may be necessary to determine current conditions.) An example of a development condition reads as follows:

- There is a Class III Seismic Hazard area on portions of this property. Development of this property must follow the Sensitive Areas Ordinance, KCC 21.54.120 – KCC 21.54.180.

In addition to the generalized treatment of fish-bearing waters outlined above, the West Hylebos Creek system gets added attention. The major tributary of this creek flows through areas

of high intensity urban uses, such as manufacturing, as well as lower density residential areas. Protection is given to this stream using development setbacks (the standards applied are consistent with those used in other community planning areas). The development condition reads as follows:

- Preserve an undisturbed corridor not less than 30 feet from the normal water's edge on both sides of the stream or 20 feet from the top of the bank on both sides, whichever is greater. (The actual width of the setback varies and depends on the stream classification.)

HYLEBOS WETLAND #18 PROTECTION IS NECESSARY

Hylebos Wetland No. 18 is unique in many ways. Its protection has been a focal point of two planning efforts. For a detailed discussion of the wetland and the related policies, see chapter five of the Federal Way Community Plan.

The development conditions, in tandem with the surrounding land use concept, protect the integrity of the Hylebos wetland system and are vital to the maintenance of its unique qualities. The conditions were drawn from work on wetlands inventory, rating and protection methods currently being developed by the King County Planning Division's Resource Planning Section. (This work is aimed toward revising the Sensitive Areas Ordinance in order to distinguish among wetland types and provide King County's most important wetlands with more comprehensive protection). The property-specific application of the following development conditions are

found on the individual zoning maps. These conditions are as follows:

1. **Wetland Studies – Required**

   The Department of Planning and Community Development's director may require a special wetland study for development outside the Hylebos Wetland #18's required 100 foot buffer if the development may cause a wetland alteration or otherwise pose potential significant adverse impacts to wetland values and functions.

2. **Wetland Studies – Preparation and Contents**

   The wetland study shall be conducted by a biologist, botanist, plant ecologist or similarly qualified professional with the assistance, if required by BALD or SWM, of a professional engineer. Minimum requirements for identifying and mapping the wetland edge and the preparation and contents of the wetland study shall be contained in administrative guidelines prepared by the Department.

3. **Wetland Edge – identification**

   As a part of the required wetland study, the edge of the Hylebos Wetland #18 shall be identified using a transect or other accepted scientific method which is acceptable to the department; provided, the director is authorized to require a specific method to identify the wetland edge.

   The criteria for locating the wetland edge are based on the principle of predominance of wetland plants as set forth in the definition of wetlands which appears in KCC 21.04: "Wetlands areas inundated or saturated by surface or groundwater at a frequency and duration to support, and that under normal circumstances

do support, a prevalence of vegetation typically adopted for life in saturated soil conditions."

The wetland edge is the line around the wetland where the prevalence of hydrophytes, or wetland plants, ceases. For the purpose of defining the wetland edge, the prevalence of hydrophytes ceases where the combined percent of hydrophytes in the overstory, understory and ground cover is less than fifty percent.

4. **Protection and Recording**

   a. Those portions of the Hylebos Wetland #18 located within a proposed subdivision shall be protected as permanent open space by dedication to a home owner association, community or public body approved by the department director. For development subject to other permits, King County shall encourage protection of the Hylebos Wetland #18 as permanent easement, conservation easement or Native Growth Protection Easement, dedication or other alternative means acceptable to King County.

   b. Creation of new lots other than separate tracts dedicated or reserved as permanent open space shall not be permitted inside the Hylebos Wetland #18.

   c. As a condition of any permit approval, the applicant shall record, with the Records and Elections Division, on the title to the subject property or properties, a notice which alerts current and future property owners of the presence and location of the Hylebos Wetland #18, King County regulations which may apply to any future development and any conditions required by King County of the permit approval. The notice shall be on a form provided by the director.

5. **Wetland Buffer – Required**

   a. General Provisions

      1) The width of the buffer shall be determined by measurement which is perpendicular to the identified wetland edge at all points.

      2) The outside boundary of the buffer shall be surveyed and shown on all plats, short plats or PUDs.

   b. Minimum Buffer Width

      New development adjacent to the Hylebos Wetland shall preserve an undisturbed buffer not less than 100 feet wide.

   c. Increased Buffer Width

      The buffer's width shall be increased over the required 100 foot minimum when either of the following exist within or adjacent to the wetland buffer: 1) endangered, threatened or sensitive species; or 2) roads, utility rights-of-way, dikes, channels, etc. Provisions for increasing the buffer's width shall be contained in administrative guidelines prepared by the Department.

   d. Adjacent Stream Corridors

      New development adjacent to streams which enter or leave the Hylebos Wetlands shall preserve an undisturbed corridor, on the property subject to the applicable development permit, which is wide enough to maintain the natural hydraulic and habitat functions of that stream. Provisions for preserving adjacent stream corridors shall be contained in administrative guidelines prepared by the Department.

6. **Alteration**

Alteration of the Hylebos Wetland #18 and its required buffer is prohibited except for: 1) facilities necessary to allow controlled pedestrian access for scientific, educational or interpretive activities; or 2) fences or other barriers necessary to protect wetland habitat.

7. **Enhancement – Required**

Alteration of the Hylebos Wetland #18 or its buffer for facilities necessary to allow controlled pedestrian access for scientific, educational or interpretive activities shall not be permitted unless accompanied by a County-approved enhancement plan.

8. **Restoration – Required**

If the Hylebos Wetland #18 and/or its required buffer has been partially or totally altered without an approved development permit or in violation of the conditions of any applicable permit, complete restoration pursuant to an approved restoration plan shall be required. Restoration measures include, but are not limited to, removal of fill, regrading to original contours and revegetation of all cleared areas with native trees and/or plants which are necessary to replace wetland values and functions lost due to alteration. If information on wetland values and functions prior to alteration is not available, the department shall specify the criteria for restoration. Restoration shall be completed prior to approval of any development permits.

9. **Restoration and Enhancement Plans – Preparation and Contents**

Plans for wetland restoration or enhancement shall be prepared by a biologist, botanist, plant ecologist or similarly qualified professional with

the assistance of a professional engineer. The plan shall be jointly reviewed by the Building and Land Development and Surface Water Management Divisions. The State Departments of fisheries and Game may also be consulted, if considered necessary by the Department. Minimum requirements for preparation, contents and department evaluation of restoration and enhancement plans shall be contained in administrative guidelines prepared by the Department.

10. **Water Quantity and Quality**

The following provisions shall apply to the protection of water quantity and quality in the Hylebos Wetland #18:

a. Construction and operation of stormwater retention or detention facilities in the Hylebos Wetland #18 is prohibited;

b. The Hylebos Wetland #18 shall be protected from erosion and sedimentation by the use of erosion/sedimentation control practices and measures approved by the Surface Water Management Division;

c. In areas with no natural point of inflow (i.e., stream), any surface water directed toward the Hylebos Wetland #18 shall be directed and filtered through a drain field, or other appropriate technique used, to avoid erosion, sedimentation and excess nutrient inflow into the wetland;

d. The Hylebos Wetland #18 shall be protected from pollution by toxic wastes, petrochemical or other pollutants by the use of measures approved by the Surface Water Management Division which remove pollutants from surface water runoff water before it enters the wetland;

e. The velocity of stormwater runoff entering the Hylebos Wetland #18 shall be limited to pre-development levels;

f. In designated "critical areas" pursuant to K.C.C. 20.50, the Surface Water Management Division may recommend additional measures to minimize flooding, drainage or erosion problems;

g. Where possible, water level fluctuations in the Hylebos Wetland #18 shall be minimized during the spring breeding season (April through June).

11. **Endangered, Threatened and Sensitive Species – Protection**

Upon receipt of new information regarding the status or location of species designated by the federal government or Washington State as Endangered, Threatened or Sensitive, the director is authorized to require measures for protecting the species and its habitat. Provisions for protecting Endangered, Threatened and Sensitive Species shall be contained in administrative guidelines prepared by the Department.

12. **Human Access**

The following provisions shall apply to human access and interpretive use in the Hylebos Wetland #18:

* * *

EXHIBIT 4

Chapter 21.18
S-E
SUBURBAN ESTATE CLASSIFICATION

Sections:

21.18.010 Purpose of classification.
21.18.020 Permitted uses.
21.18.030 Lot area.
21.18.040 Lot area per dwelling unit.
21.18.050 Lot width.
21.18.060 Front yard.
21.18.070 Side yards.
21.18.080 Height.
21.18.090 Permissible lot coverage.
21.18.100 Placement of buildings.

21.18.010 Purpose of classification. The principal objective and purpose to be served by this classification and its application is to provide areas permitting uses and activities more rural in character than practical in the more concentrated urban areas and, at the same time, establishing and maintaining a living environment of high standard for single-family residential use. As a means to this end, substantial lot areas and yards and open spaces are required. (Res. 25789 § 900, 1963).

21.18.020 Permitted uses. In an S-E zone the following uses only are permitted and as hereinafter specifically provided and allowed by this chapter, subject to the off-street parking requirements and the general provisions and exceptions set forth in this title beginning with Chapter 21.46:

A. Any use permitted in the RS classification under the same conditions set forth in such classification, except

that the lot area, yard and open space requirements set forth in this classification shall apply.

* * *

21.18.030 Lot area. The minimum required area of a lot in an S-E zone shall be thirty-five thousand square feet. In a multiple lot subdivision approved subsequent to the effective date of the resolution codified herein, the minimum lot area shall be deemed to have been met if the average lot area is not less than thirty-five thousand square feet. In computing the average square foot area of lots in a subdivision not more than twenty-five percent of the number of lots may contain an area less than thirty-five thousand square feet and in no case shall a lot contain less than twenty-eight thousand square feet of area. For lots containing more than thirty-five thousand square feet of area not more than forty-two thousand square feet of area may be credited in determining the average. (Res. 33159 (part), 1967: Res. 25789 § 902, 1963).

21.18.040 Lot area per dwelling unit. In an S-E zone the lot area per dwelling unit shall be not less than thirty-five thousand square feet, except that in multiple lot subdivisions approved subsequent to the effective date of the resolution codified herein, the lot area per dwelling unit for each individual lot shall be the area of the individual lots conforming to the approved subdivision. (Res. 33159 (part), 1967: Res. 25789 § 903, 1963).

21.18.050 Lot width. In an S-E zone every lot shall have a width of not less than one hundred thirty-five feet. (Res. 25789 § 904, 1963).

21.18.060 Front yard. In an S-E zone every lot shall have a front yard with a depth of not less than thirty feet. (Res. 25789 § 905, 1963).

21.18.070 Side yards. In an S-E zone every lot shall have a side yard on each side of the lot which side yard shall have a width of not less than ten feet. (Res. 25789 § 906, 1963).

21.18.080 Height. In an S-E zone no building or structure shall exceed a height of thirty-five feet, except for agricultural buildings as set forth in the general provisions. (Res. 25789 § 907, 1963).

21.18.090 Permissible lot coverage. All buildings and structures including accessory buildings and structures and any areas used to provide parking space, shall not cover more than thirty-five percent of the area of the lot. (Res. 25789 § 908, 1963).

* * *

EXHIBIT 5

* * *

Chapter 21.08
RS SINGLE-FAMILY DWELLING CLASSIFICATION

Sections:

21.08.010 Purpose of classification.
21.08.020 Permitted uses-Primary residential.
21.08.030 Permitted uses-Accessory residential.
21.08.040 Permitted uses-Primary nonresidential.
21.08.050 Permitted uses-Accessory nonresidential.
21.08.060 Conditional uses.
21.08.062 Administrative conditional uses.
21.08.070 Utilities.
21.08.080 Lot area.
21.08.090 Lot area per dwelling unit.
21.08.100- Lot width.
21.08.110 Front yard.
21.08.120 Side yards.
21.08.130 Height.
21.08.140 Permissible lot coverage.
21.08.150 Placement of buildings and structures.
21.08.160 Limitations on use.
21.08.170 Homeowner's Association contract.

21.08.010 Purpose of classification. The principal objective and purpose to be served by this classification and its application is to create a living environment of the highest standards for single-family dwellings. Other related uses contributing directly to a complete living environment are considered compatible and therefore also permitted. A further related consideration is to make it possible more efficiently and economically to design, install and maintain all physical public service facilities in

terms of size and capacity to adequately and permanently meet needs resulting from a defined intensity of land use. (Res. 25789 § 400, 1963).

* * *

21.08.040 Permitted Uses – Primary nonresidential. The following nonresidential uses only are permitted outright in an RS zone, subject to the off-street parking requirements, landscaping requirements, and the general provisions and exceptions set forth in this title beginning with Chapter 21.46, and subject to the provisions of the King County shoreline management master program where applicable:

A. Art galleries and museums, when located in a public park or on a public or private school site;

B. Cemeteries which were legally in existence prior to the effective date of the adoption of this title;

C. Churches, providing the following conditions are conformed to:

1. All buildings and structures on the site shall not cover more than forty percent of the area of the site.

2. Buildings and structures on the site shall not be closer than thirty feet to any property line, except that a detached one-family dwelling on such site need conform only to the yard requirements and required distance between buildings as prescribed for residences by this chapter.

3. The height limits of the RS classification shall apply, except that the height shall be measured to the mean height of the roof.

4. On interior lots, the required side yards may be used to provide off-street parking areas and on corner lots the interior side yards may be similarly used. Under no circumstances may the required front yard or the side yard on the side street be used for off-street parking.

5. All lights provided to illuminate any parking area or building on such site shall be so arranged as to direct the light away from any adjoining premises.

6. Church sites shall abut and be accessible from at least one public street having two moving traffic lanes and a dedicated width that will permit not less than thirty-six-foot roadway.

7. The following signs only are permitted:

a. One sign area, lighted or unlighted, on the outside wall of the main building and parallel thereto, having an area not greater than forty square feet;

b. A detached sign having an area of not more than twenty square feet and on which both faces may be utilized, such being securely mounted on the ground on supports and the top of which sign shall be not more than six feet above the natural level of the ground upon which it rests. On corner and reverse corner lots one such sign may be placed facing each street;

c. A detached readerboard sign having an area no greater than fifty square feet, lighted or unlighted, and on which both faces may be utilized.

8. For purposes of determining conformance to the foregoing conditions and the parking requirements, a plot plan showing ultimate location and use of all buildings, location of signs, location and amount of off-street parking areas, location and adequacy of ingress to and egress from parking areas, landscaping and sketches to

scale showing the building elevations and floorspace to be devoted to seating or assembly purposes, shall be filed with and approved by the building and land development division prior to the issuance of any building permit and thereafter the issuance of any building permits shall be governed by and conform to the approved plot plan. If later, a modified plot plan is submitted, the modified plan shall conform to the conditions and requirements of this title or any amendments in effect at the time the modified plan is submitted:

* * *

21.08.080 Lot area. In recognition of the variations in topographical conformation and geographical relationships of portions of King County and the advantages that can attach to living conditions, including considerations of health, safety and general welfare and the amenities of living which naturally relate to the areas devoted to residential and related purposes, there are established in the RS classification four minimum required lot areas required as set forth herein and, as to location, are identified on the zoning map by the designations RS-15,000, RS-9600, RS-7200 and RS-5,000:

A. The minimum required area of a lot in an area designated as RS-15,000 shall be fifteen thousand square feet.

B. The minimum required area of a lot in an area designated as RS-9600 shall be nine thousand six hundred square feet.

C. The minimum required area of a lot in an area designated as RS-7200 shall be seven thousand two hundred square feet.

D. The minimum required area of a lot in an area designated as RS-5000 shall be five thousand square feet.

In multiple-lot subdivisions and short subdivisions approved subsequent to the effective date of this title, the minimum lot area shall be deemed to have been met if, either: A. the average lot area, or B. the area in lots plus the area designated for permanent open space or recreational uses divided by the total number of lots is not less than the minimum lot area requirement of the zone in which the property is located as identified on the zoning map. Said open space or recreation area may be accepted for dedication to King County at the county's option and only if the property's size and features meet adopted King County open space and park acquisition standard, or may be owned in undivided interest by the residents of the subdivision, who shall be responsible for any required maintenance. In either case, the subdivider shall remove or eliminate all hazardous conditions such as construction debris, dead trees or abandoned mine workings within the designated area prior to final plat approval. If the property is being dedicated, the Parks Division may require additional improvements.

E. Subdivisions or short subdivisions in which lot size averaging, lot clustering or the flexible setback provisions of Ordinance 4304 are used shall meet the following criteria:

1. All building lots must be capable of meeting off-street parking requirements and be capable of accommodating residences which meet sewerage disposal and building code requirements. No more than one hundred thirty-five percent of the minimum required lot area may be credited to any oversized lot when calculating average

lot area, and no oversized lot used for lot averaging may be further subdivided;

2. Common open space areas may not be computed to include any submerged land unless part of a planned unit development as provided in Chapter 21.56;

3. At least fifty percent of the common open space area must be usable for active recreation (i.e. have a slope of not more than five percent), free of hazardous conditions, and dry (i.e. above the one-hundred-year floodplain) unless it consists of a valuable natural feature, preservation of which is consistent with adopted county policies;

4. When adjacent dwelling units are attached, the aggregate structures' design and location with respect to yards and common open space shall be consistent with established neighborhood character and scale;

5. If site contours permit, lots must allow potential orientation of building for maximum winter solar heat gain, and minimum obstruction of other buildings' solar access;

6. The Building and Land Development Division may require typical plot plans and building elevations prior to final plat or short plat approval, and may condition the location and design of structures to accomplish the purposes of this section;

7. Slight variations from the requirements of this subsection may be authorized by the director when not inconsistent with their intent and purpose.

F. All normal lot area and lot dimension requirements shall apply to lots proposed to be created through a subdivision or short subdivision unless King County determines that a proposed modification of normal

requirements through lot size averaging or lot clustering or the flexible setback provisions of Ordinance 4304 and K.C.C. 21.48 is consistent with the purposes of this title and county subdivision regulations, and the criteria set forth in this section. King County shall deny or modify any proposed variation from normal lot area and lot dimension requirements within a subdivision or short subdivision as necessary to accomplish the purposes of this section, and to minimize adverse impacts on adjacent properties. (Ord. 4667 § 1, 1979: Ord. 3144 § 8 (part), 1977: Ord. 1887 § 1, 1974; Res. 36363 (part), 1968: Res. 25789 § 402, 1963).

21.08.090 Lot area per dwelling unit. The lot area per dwelling unit shall be no less than the minimum area of a lot as required for the zone in which the property is located as identified on the zoning map, except that in multiple-lot subdivisions approved subsequent to the effective date of this title,* the lot area per dwelling unit for each individual lot shall be the area of the individual lots conforming to the approved subdivision.

In the case of a permitted transitional two-family dwelling, the lot area per dwelling unit shall be not less than one-half of the minimum required area of the lot. If a lot has less than seven thousand two hundred square feet, the lot area per dwelling unit for a transitional use shall be not less than three thousand square feet. (Ord. 4667 § 2, 1979: Ord. 3144 § 8 (part), 1977; Res. 25789 § 403, 1963).

[* See Section 21.70.010.]

21.08.100 Lot width. Every lot in an RS zone shall maintain a width of not less than the following:

A. The minimum width of a lot in an area designated as RS-15,000-eighty feet;

B. The minimum width of a lot in an area designated as RS-9600-seventy feet;

C. The minimum width of a lot in an area designated as RS-7200-sixty feet;

D. The minimum width of a lot in an area designated as RS-5000-forty feet. (Ord. 4667 § 3, 1979: Ord. 3144 § 8 (part), 1977; Res. 25789 § 405, 1963).

21.08.110 Front yard. Every lot in an RS zone shall have front yards with a depth of not less than twenty feet, except on key lots and transitional lots this depth may be reduced to fifteen feet. (Ord. 3144 § 8 (part), 1977; Res. 25789 § 405, 1963).

21.08.120 Side yards. In an RS zone every lot shall have a side yard on each side of the lot, which side yard shall have a width of not less than five feet. (Ord. 3144 § 8 (part), 1977: Res. 25789 § 406, 1963).

21.08.130 Height. In an RS zone no residential building or structure shall exceed a height of thirty feet. Any other building or structure may exceed such height limit; provided each required side yard and open space is increased one additional foot in width for each additional foot in height such building or structure exceeds thirty feet; and provided, further, that a site occupied by a building or structure having a height greater than thirty feet shall have no property alienated from such site which would reduce the yards and open spaces required or provided to compensate for the greater height, nor

which would reduce the total required minimum area of the site upon which the permitted lot coverage was based. In no case, however, may a building or structure exceed a height of fifty feet, except for church steeples and the like as provided in Section 21.48.030. If a parcel contains an area two or more times, but not more than four times, the minimum required lot area for the area district in which the property is located as identified on the zoning map, then the portion of the parcel committed to the building site, including the additional yards, and open spaces provided to compensate for the greater height of buildings, shall be accurately defined as a separate lot by means set forth in the subdivision code for platting or dividing property. (Ord. 3144 § 8 (part), 1977: Res. 25789 § 407, 1963).

21.08.140 Permissible lot coverage. A. Except as otherwise provided for schools and churches, all buildings, including accessory buildings and structures, but not including any open areas used to provide parking spaces or private swimming pools, shall not cover more than thirty-five percent of the area of the lot. In the case of churches and schools, the limitation of lot coverage shall pertain to buildings and structures only and does not include open air parking areas.

B. In subdivisions or short subdivisions where lot size averaging, lot clustering or the flexible setback requirements of K.C.C. 21.48.270 are used, residential lot coverage shall be limited to thirty-five percent of the minimum lot area of the zone classification, except that the lot coverage provisions of the RT zone shall apply to lots developed with townhouses. (Ord. 6067 § 2, 1982:

Ord. 4667 § 4, 1979: Ord. 3144 § 8 (part), 1977; Res. 25789 § 408, 1963).

* * *

APPENDIX C

SUMMARY JUDGMENT MOTION SET FOR:
Wednesday, April 20, 1988

SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR KING COUNTY

PRESBYTERY OF SEATTLE, a Washington corporation, Plaintiff, v. KING COUNTY, Defendant.	NO. 87-2-07034-4 AFFIDAVIT OF DYANNE SHELDON

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

Dyanne Sheldon, being first duly sworn on oath deposes and states as follows:

1. I am the Wetlands Planner for the Building and Land Development Division of King County. In this position my primary responsibility is to review permit applications concerning their environmental impacts on wetlands. I am also responsible for identifying wetland boundaries and conducting environmental studies. I make this affidavit on my own personal knowledge.

2. I have worked as a professional wetland biologist in the Pacific Northwest since 1981. Prior to that I was Director of an Environmental Education Center which focused its attention on a 150 acre marsh/forest complex in the upper Midwest.

3. In 1981 King County conducted an inventory of the wetlands located in the Western one-half of King County. The inventory was conducted pursuant to the King County sensitive areas ordinance, King County Code 21.54 which was enacted in 1979. The purpose of the sensitive areas ordinance is to determine areas of special concern and to supplement the development requirements in the zoning code by providing for additional controls in critical sensitive areas. Wetlands are identified by King County as a critical sensitive environmental area. Pursuant to King County Code 21.54.170:

> "Wetlands located on the site of a proposed development requiring a building permit, grading permit; shorelines substantial development permit, conditional use permit, unclassified use permit, variance, rezone, planned unit development, subdivision or short subdivision *shall not be disturbed or altered through excavation, filling, building, or other improvements unless King County determines, upon review of special studies completed by qualified professionals, that either:*
>
> (a) The wetland does not serve any of the valuable functions of wetlands identified in Section 20.12.080 in Army Corps of Engineers 33 CFR 320.4(b), including but not limited to wildlife habitat and natural drainage functions;
>
> (b) proposed development would preserve or enhance the wildlife habitats natural drainage, and/or other valuable functions of wetlands . . . "(Emphasis added.)

4. The term "wetland" is defined in the King County Code, Section 21.04.920 as follows:

> "Wetlands means those areas of King County that are inundated or saturated by ground or

> surface water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas. (Army Corps of Engineers Regulation CFR 323.2(c)). (Ord. 4365 § 6, 1979).

5. Essentially, a wetland is a swamp, marsh or bog that supports vegetation typically adapted for life in saturated soil conditions. Factors such as hydrology and soils influence the presence of hydrophytes (a technical term used for plants which are adapted for life in a saturated environment). The presence of specific vegetation of plant communities is often the clearest indicator of the existence of a wetland.

6. Habitat value is related to the diversity of the vegetation present in the wetland. The more diverse the vegetation, the more complex the habitat provided. Complexity encompasses both the variety dimension and spatial pattern of vegetation and subsequent wildlife usage. Complex wetland systems provide a variety of "niches". Niches are places which provide all the critical habitat components for a particular species. For example, Canada geese require open water, emerent wetlands for food sources, and upland (dry) sites for nest building. Every species has its particular specific needs which define its niche. These niches must provide mating, breeding and rearing sites as well as locations for spawning in the case of fisheries.

7. Wetland areas are primary habitat for waterfowl such as ducks, geese and shorebirds. Other forms of

wildlife, such as fish, mink, coyote, raccoon and amphibians rely on the wetland for their survival, as well. For example, salmon often spawn in the marshy channels of a wetland and the wetland provides seasonal recharge to streams which are critical for fisheries survival.

8. If the wetland area is diminished and/or eliminated, the niches are destroyed. As a consequence, wildlife habitat is eliminated and therefore wildlife populations are reduced. Elimination of habitat will lead to the reduction and demise of wildlife. Accordingly, the environmental effects of habitat elimination have consequences beyond the immediate impact site.

9. Hylebos Wetland No. 18 is rated a Class #1 unique and outstanding in King County's wetland inventory. It is one of the last major wetlands in Federal Way and is of major significance in King County. Wetlands are rated No. 1 if there is the presence of species recognized by the federal government or the State of Washington as rare, endangered, or threatened and the wetland is a sensitive or outstanding potential habitat for such species.

10. The Hylebos No. 18 Wetland is a very old, complex wetland system as indicated by its soils, vegetation and forested area comprised of mature timber. Wetland age can often be roughly estimated by the depth of organic soil (peat) present on site. George Rygg wrote in the book "Peat Resources of Washington State", that it takes approximately 100 years to accumulate *one inch* of organic peat soil. The peat soils in the Hylebos No. 18 Wetland are of undetermined depth (i.e. deeper than 10 feet in the central portion) – meaning the wetland is

extremely old and has been an influencing factor in land use for many generations.

11. The Hylebos No. 18 Wetland contains an old bog system which makes it quite unique and unusual from a biological standpoint. Bogs have an inherent value because of their uniqueness. They form differently than a cat-tail marsh which has a mineral soil basis. Bogs begin without organic soil, but over time deep peat deposits are formed from accumulated dead plants. These peat deposits can reach depths of 50 to 100 feet or more over the milenia. Hylebos No. 18 Wetland contains a cedar bog, in other words old growth cedar has become established above the saturated peat soils. It is one of the few still in existence in the Pacific Northwest.

12. The development of the property that surrounds the Hylebos No. 18 Wetland is of great environmental concern to citizens in the Federal Way community and King County. In the 1980 Federal Way Community Plan and Area zoning policies and development conditions were adopted to protect the Hylebos Wetland. Again when the Federal Way Community Plan update process was commenced in 1984 policies and development conditions were proposed by the King County Executive and were a major topic during the process. A final plan was approved by the King County Council in September of 1986. In September 1986, the King County Council adopted Ordinance No. 7746; the Federal Way Community Plan and Area Zoning. I worked on formulating the development conditions to protect the Hylebos wetland No. 18 for the 1986 plan. The sole purpose of these conditions is to protect the environment associated with Hylebos No. 18 Wetland and Hylebos Creek.

13. Ordinance No. 7746 contains policies and 12 development conditions to protect the Hylebos Wetland. These are applicable to all parcels which are adjacent to or contain the Hylebos No. 18 Wetland. The first requirement is that the wetland edge be determined by BALD. The wetland boundary identified in the 1986 plan is an approximation only. It is based on the field worth of six regional wetland experts who coordinated the edge deliniation of the Hylebos No. 18 Wetland. The mapping provided by the County is an approximation because the cost of an actual survey was not provided for. A subsequent condition requires a 100-foot buffer surrounding the entire wetland edge. A minimum of 100 foot buffer from the wetland edge is necessary to maintain the integrity and functioning of the wetland environment. This 100-foot buffer is an integral element in the preservation and protection of the Hylebos No. 18 Wetland and acts as an interface between the wetland and upland (dry area). The buffer helps to maintain habitat diversity, improves water quality entering the wetland, and attenuates the impacts from human activities, domestic animals and other physical intrusions. Without it habitat value of the wetland would be diminished, water quality impacts would more likely occur, and physical intrusions by human and domestic animals would be more prevalent.

14. I have reviewed the complaint filed by the plaintiff in this lawsuit and the Declaration of R. W. Thorpe. The Hylebos Wetland No. 18 is located on approximately one-third of plaintiff's property. This wetland has been present for a long time though the property in question may have had various other land uses such as agricultural fields. Agricultural use in old wetlands is

common as the deep organic soils provide perfect field (crop) conditions. Prior to the adoption of Ordinance 7746, SEPA and King County's sensitive areas ordinance would have applied to any development. From 1980 to 1986 the 1980 Federal Way Community Plan and Area Zoning development conditions to protect the wetland would have applied. These conditions allowed no fill below the 210 foot contour line and required a 200 foot buffer from the "mean January highwater mark" which was interpreted as the wetlands edge. The 1980 development conditions to protect the Hylebos Wetland are far more restrictive than the 1986 development conditions.

15. Mr. Thorpe assumes that the 100 foot buffer line is accurate, though he states that the wetland boundary is unknown. He also states that the proposed five lot subdivision is a feasible use of the property in question. However, that plat design totally ignores the acknowledged presence of the Hylebos No. 18 Wetland, regardless of the 100 foot buffer requirement. The development scheme fails to include requirements of the Zoning Code regarding traffic and access, as well as the state mandated SEPA requirements for the protection of sensitive areas.

As no accurate wetland study or deliniation was requested from BALD, the effects of the 100 foot buffer are unknown. And, as no actual application for development of this parcel has been made there can be no determination of taking as no proposed use has been denied.

16. The implication by Mr. Thorpe in his declaration that a 100 foot buffer is a minimum and that the buffer could be expanded at will is misleading. The buffer would only be expanded to protect the presence of

known rare, endangered, or threatened species as identified Federally or by the State of Washington. As none of these species occur within the vicinity of the subject property the buffer would not be expanded beyond the recommended 100 feet.

/s/ Dyanne Sheldon
DYANNE SHELDON

SUBSCRIBED AND SWORN TO before me this 13 day of April, 1988.

/s/ Ann Schindler
Notary Public in and for the State of Washington residing at Kitsap County.
My Commission Expires:
1988 June.

FILED
OCT 3 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 90-298

In The

Supreme Court of the United States

October Term, 1990

PRESBYTERY OF SEATTLE,

Petitioner,

v.

KING COUNTY,

Respondent.

On Petition for Writ of Certiorari to the Washington Supreme Court

PETITIONER'S BRIEF IN REPLY TO THE OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES CITED ii

I. THE "RELEVANT PARCEL" ISSUE IN AND OF ITSELF PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE RESOLVED BY THIS COURT 2

A. The "Relevant Parcel" Issue Was Finally Decided by the Washington Supreme Court.. 2

B. Ripeness Considerations Are Not a Barrier to the Court's Review of This Issue 5

II. THE WASHINGTON SUPREME COURT FOUND IT NECESSARY TO AND DID RESOLVE OTHER REGULATORY TAKINGS ISSUES ARISING UNDER THE UNITED STATES CONSTITUTION 5

CONCLUSION 7

TABLE OF AUTHORITIES CITED

Page

CASES

Allingham v. City of Seattle, 109 Wash. 2d 947, 749 P.2d 160 (Wash. 1988) 2

Armstrong v. United States, 364 U.S. 40 (1960) 8

First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987) 9

Keystone Bituminous Coal Association v. DeBenedictis, 480 U.S. 470 (1987) 4

Orr v. Orr, 440 U.S. 268 (1979) 7

Penn Central Transportation Company v. City of New York, 438 U.S. 104 (1978) 3, 4, 8

San Diego Gas & Electric Company v. City of San Diego, 450 U.S. 621 (1981) 8

Whitney v. California, 274 U.S. 357 (1927) 7

STATUTES

28 U.S.C. § 1257 5

§ 1257(a) 4

UNITED STATES CONSTITUTION

Fifth Amendment 3, 6, 8

MISCELLANEOUS

R. Stern, E. Gressman & S. Shapiro, Supreme Court Practice at 158 (6th ed. 1986) 7

No. 90-298

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Respondent's brief in opposition (Opp.) contends that the Washington Supreme Court did not render a decision on the merits of petitioner's takings claim. Respondent is incorrect. The Washington court rendered a final decision with regard to two significant areas of federal constitutional takings law.

I

THE "RELEVANT PARCEL" ISSUE IN AND OF ITSELF PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE RESOLVED BY THIS COURT

A. The "Relevant Parcel" Issue Was Finally Decided by the Washington Supreme Court

Petitioner, Presbytery of Seattle (Presbytery), claims that at least one-third of its property, the area within the boundary of Hylebos Wetland No. 18, has been taken because that portion of its property must forever remain undeveloped for the benefit of the public. Petition for Writ of Certiorari (Pet.) at 5. The court below recognized that this is the Presbytery's claim against respondent, King County (County). Appendix to Petition for Writ of Certiorari (Pet. App.) at A-4 ("It is Presbytery's argument that the ordinance prohibits the development of a substantial portion of its property and thereby effects a taking of property without just compensation.") Indeed, Presbytery relied considerably upon *Allingham v. City of Seattle*, 109 Wash. 2d 947, 749 P.2d 160, 163 (Wash. 1988), where the very same Washington Supreme Court only two years prior ruled that regulations which effect only a portion of a larger parcel can result in a taking.

The Washington court therefore stated the first issue as follows:

> "ISSUE ONE. Does a land use regulation which prohibits development of a portion of an undivided parcel of property constitute a 'taking' of the portion which must remain undeveloped?" Pet. App. at A-5.

In framing this issue, the Washington court interpreted the local ordinance as prohibiting development within the wetlands portion of Presbytery's property. This interpretation of local law is also supported by the record.[1] The result is that regardless of what development might be allowed for other nonwetlands portions of the property, the court recognized that under the regulation the wetlands area "must remain undeveloped."[2]

Nevertheless, the Washington court rejected Presbytery's takings claim. The court concluded that the relevant unit of property to be considered in Fifth Amendment takings claims is the entire legal parcel considered as a whole.

The very nature of this Court's prior takings analyses precludes the application of such hard and fast rules. This is particularly true where a regulation impacts land use so harshly as to require that the land in question remain undeveloped. Indeed, this Court has recognized that the "parcel as a whole" discussion found in *Penn Central Transportation Company v. City of New York*, 438 U.S. 104, 130-31 (1978), is inadequate to meet the definitional

---

[1] The affidavit of Bryan Glynn, Manager of King County Building and Land Development Division, submitted by the County (Appendix to Opp. at 13), makes clear that although development may be allowed for uplands portions of Presbytery's property that are adjacent to the Hylebos wetland, any plan (such as the plan suggested by Mr. Thorpe) to build within the wetland boundaries would be rejected. Appendix to Opp. at 18 (Paragraph 10 of affidavit).

[2] *See also* Pet. App. at A-21, where the court below recognized that approximately one-third "of the owner's land will have to remain 'open space' to protect the Hylebos wetland."

issues that might arise in other cases. *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470, 497 (1987).[3] The petition and supporting amici briefs fully set forth the reasons why this unsettled issue, which broadly impacts property owners, should be reviewed by this Court. *See* Pet. at 18-22; brief amicus curiae of American College of Real Estate Lawyers at 11-14; brief amicus curiae of the American Farm Bureau Federation at 12-13; brief amicus curiae of Oregonians in Action at 5-7.

The Washington Supreme Court's ruling rejected Presbytery's claim that a portion of its property was taken. That rejection constitutes a final judgment by the state's highest court on the merits of a federal claim. Jurisdiction of this Court is properly invoked under 28 U.S.C. § 1257(a).[4]

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[3] Unlike the present case, this Court in *Penn Central* found there was no absolute prohibition of construction in the airspace above the old Grand Central Terminal, and that right of use was not abrogated for the further reason that the owners were provided transferable development rights. *Penn Central*, 438 U.S. at 137. The present case provides this Court with the opportunity to refine the *Penn Central* "parcel as a whole" analysis for cases involving regulation of portions of a larger parcel where the regulation operates as severely as does the one here. In doing so, the Court could consider the applicability of Chief Justice Rehnquist's view in *Keystone* that when a regulation "extinguishes the whole bundle of rights in an identifiable segment of property," the effect on the property owner "is indistinguishable from the effect of a physical taking." *Keystone*, 480 U.S. at 517 (Rehnquist, C.J., dissenting).

[4] It should also be noted how the County has confused the "final decision" requirement of takings law with (continued)

B. Ripeness Considerations Are Not a Barrier to the Court's Review of This Issue

Only after rejecting the takings claim as to one-third of the Presbytery's property, did the court below consider whether a takings claim was ripe with respect to the parcel as a whole. And it was only with respect to the parcel as a whole that the court below concluded there was no final decision regarding what development might be allowed on the property.

Significantly, the court's discussion and holding regarding exhaustion and futility with respect to the parcel as a whole has no bearing whatsoever on the finality of the regulation's impact on the one-third of the property that "must remain undeveloped."

II

THE WASHINGTON SUPREME COURT FOUND IT NECESSARY TO AND DID RESOLVE OTHER REGULATORY TAKINGS ISSUES ARISING UNDER THE UNITED STATES CONSTITUTION

Apparently the County is uncomfortable with the broad and radical pronouncements made by the Washington Supreme Court regarding federal constitutional takings law, including the court's novel adoption of

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the final judgment requirement of Section 1257. *See* Opp. at 12. Regardless of the County's confusion, this case presents both a final decision concerning the impact of the regulation on the one-third portion of Presbytery's property, as well as a final judgment of the Washington Supreme Court.

a "threshold test" and its characterization of takings challenges as due process violations not requiring compensation. The County's brief in opposition suggests that these pronouncements are mere "dicta" (Opp. at 8), and that "[t]o the extent the court engaged in any discussion arguably contrary to federal law, it played no role in the court's decision." Opp. at 7.

But the Washington court did not take such a limited view of its opinion. The court stated:

> "The issues presented in this case are interrelated and cannot be analyzed as separate and distinct inquiries. It is impossible to analyze the exhaustion doctrine and its futility exception without first having a clear understanding of the tests to be utilized for regulatory takings and substantive due process violations. . . . Any case which considers the futility exception to the exhaustion requirement must view it in context of the constitutional definition of a regulatory 'taking'. Therefore, this opinion commences with a consideration of recent state and federal case law regarding constitutional limitations on land use regulations." Pet. App. at A-6.

What followed was the Washington court's bold pronouncement of its new threshold inquiry which screens out most regulatory takings claims and converts those challenges into due process claims which the court found to be noncompensable. *See* Pet. at 8-18; Pet. App. at A-8, 9. The petition and supporting amici briefs fully develop the import of this radical approach to the Fifth Amendment. Significantly, by the Washington court's own terms, these pronouncements were not dicta, but were intended to establish federal constitutional law for the State of Washington.

Under these circumstances, this Court has recognized that the federal question is properly before it. Where the state's highest court assumes that a federal constitutional issue is properly before it and proceeds to consider and rule on that issue, this Court has jurisdiction to review the matter. *Orr v. Orr*, 440 U.S. 268, 274-75 (1979); *Whitney v. California*, 274 U.S. 357, 360-61 (1927); *see generally* R. Stern, E. Gressman & S. Shapiro, Supreme Court Practice at 158 (6th ed. 1986). Accordingly, the Washington Supreme Court's conclusion that the resolution of regulatory takings standards was a prerequisite to any application of the exhaustion doctrine, and that court's subsequent ruling thereon, demonstrates without question that the federal constitutional issues raised and decided are properly before this Court.

CONCLUSION

All development of one-third of the Presbytery's property has been prohibited. The purpose of this prohibition is far different from that involved in cases where noxious uses of property have external effects. Instead, all use is prevented in order to foster a public desire to keep the property in its present state. This is justified by perceived ecological benefits to the public in general.

Presbytery submits that where government seeks to achieve a public benefit by precluding all use of property, the practical effect is no different than where government simply condemns the property for that purpose. And the legal effect is also no different. Regardless of whether a condemnation or a prohibition of use applies to an entire

parcel, one-third of the parcel, or some other quantity of private land, the effect on the property owner is the same. As Justice Brennan observed in his dissent in *San Diego Gas & Electric Company v. City of San Diego*, 450 U.S. 621, 652 (1981):

> "From the property owner's point of view, it may matter little whether his land is condemned or flooded, *or whether it is restricted by regulation to use in its natural state*, if the effect in both cases is to deprive him of all beneficial use of it." (Brennan, J., dissenting; emphasis added.)

The Washington court has concluded that regardless of the harshness of the regulation, one must always look to the larger parcel as the unit of property to be considered in a takings analysis. In addition, the Washington court has determined that regardless of how a regulation impacts the usability of one's property, whether in whole or in part, if the regulation satisfies Washington's "threshold test," no compensable taking is even possible. This result follows even though the regulation may be viewed as "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

The net effect of the Washington Supreme Court's decision is to substitute a rigid and inflexible formula for determining whether a taking has occurred. This approach is totally inconsistent with the more analytical and equitable standards found by this Court to be appropriate in evaluating Fifth Amendment takings claims, as reflected by the language quoted above from *Armstrong*, and as further amplified in cases such as *Penn Central*,

438 U.S. at 123-25, and *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 318-19 (1987).

Since the court below ruled on substantial federal questions in a manner inconsistent with federal law, it is respectfully submitted that the petition for writ of certiorari should be granted.

DATED: October, 1990

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No. 90-298

In The

Supreme Court of the United States

October Term, 1990

PRESBYTERY OF SEATTLE,

Petitioner,

v.

KING COUNTY,

Respondent.

On Petition For Writ Of Certiorari To
The Washington Supreme Court

MOTION FOR LEAVE TO FILE AND BRIEF OF AMICUS CURIAE, AMERICAN COLLEGE OF REAL ESTATE LAWYERS, IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE 1

INTEREST OF AMICUS CURIAE 3

SUMMARY OF ARGUMENT 4

ARGUMENT 5

I. THE WASHINGTON SUPREME COURT HAS APPLIED A STANDARD FOR IDENTIFYING AND COMPENSATING REGULATORY TAKINGS THAT DIRECTLY CONFLICTS WITH ESTABLISHED CASE LAW, INCLUDING DECISIONS OF THIS COURT, LOWER FEDERAL COURTS, AND STATE COURTS 5

A. The Washington Supreme Court has created a definition of regulatory taking which conflicts with this Court's decisions and the decisions of all other state and lower courts 5

B. The Washington Supreme Court has restricted the ability of a property owner to recover just compensation to such an extent that it has undone this Court's Constitutionally mandated *First English* decision ... 7

II. DEFINING THE RELEVANT PARCEL FOR TAKING PURPOSES IS AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT 11

CONCLUSION 15

TABLE OF AUTHORITIES

Page

A.A. Profiles, Inc. v. City of Ft. Lauderdale, 850 F.2d 1483 (11th Cir. 1988) 6

Agins v. City of Tiburon, 447 U.S. 255 (1980) 5, 6, 8

Allingham v. Seattle, 109 Wash. 2d 947, 749 P.2d 160 (1988) 13, 14

American Savings & Loan Assn. v. County of Marin, 653 F.2d 364 (9th Cir. 1981) 13

Boston Chamber of Commerce v. Boston, 217 U.S. 189 (1910) 7

Fifth Avenue Corp. v. Washington County, 282 Ore. 591, 581 P.2d 50 (Ore. 1978) 13

First English Evangelical Lutheran Church of Glendale v. Los Angeles County, 482 U.S. 304 (1987) ..... *passim*

Georgia Outdoor Advertising v. City of Waynesville, 900 F.2d 783 (4th Cir. 1990) 6

Hodel v. Irving, 481 U.S. 704 (1987) 12

Jackson Court Condominiums, Inc. v. City of New Orleans, 874 F.2d 1070 (5th Cir. 1989) 6

Kaiser Aetna v. United States, 444 U.S. 164 (1979) 12

Keystone Bituminous Coal Assn. v. DeBenedictis, 480 U.S. 470 (1987) 6, 12

Lake Nacimiento Ranch Company v. County of San Luis Obispo, 841 F.2d 872 (9th Cir. 1987) 6

Loretto v. Teleprompter Manhattan CATV Corporation, 458 U.S. 419 (1982) 14

MacDonald, Sommer, & Frates v. Yolo County, 478 U.S. 1035 (1986) 8

TABLE OF AUTHORITIES – Continued

Page

Nectow v. Cambridge, 277 U.S. 183 (1928) 5

Nollan v. California Coastal Commn., 483 U.S. 825 (1987) 6, 14

Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978) 5, 6, 10, 12

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) 6

Preseault v. I.C.C., 494 U.S. ___, 108 L.Ed 2d 1, 110 S. Ct. ___ (1990) 8

San Diego Gas & Electric Co. v. City of San Diego, 450 U.S 621 (1981) 8

Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981) 6

Sederquist v. City of Tiburon, 765 F.2d 756 (9th Cir. 1984) 6

Twain Harte Assoc., Ltd. v. County of Tuolumne, 217 Cal.App. 3d 71 (1990) 13

United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985) 6

Williamson County Regional Planning Commission v. Hamilton Bank, 477 U.S. 340 (1986) 8

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*

The American College of Real Estate Lawyers respectfully moves for leave to file the attached brief as *Amicus Curiae* in support of the Petitioner. Consent to file the brief has been obtained from counsel for Petitioner. Consent from counsel for Respondent was requested but refused.

As more fully explained in the attached brief, the American College of Real Estate Lawyers believes that no court other than this Court can change the decision of this Court in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987), even if that court is the court of last resort of any state.

The interest of the American College of Real Estate Lawyers lies in seeing that clear, fair, uniform, rational rules exist for property owners affected by governmental regulations involving constitutionally protected rights. The decision below would inject a radical new test as to when a regulatory taking entitling the property owner to compensation occurs.

Because of the hundreds of thousands of applications for the use of one's property that occur each year throughout the country that are constrained by governmental regulations, it is imperative that the direction given by *First English* not be permitted to be undermined by the decision of any state or lower federal court. For that reason, the American College of Real Estate Lawyers believes that this Court's review of the decision below is

essential and submits the attached brief in support of the Petitioner.

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BRIEF AS AMICUS CURIAE

INTEREST OF AMICUS CURIAE

The American College of Real Estate Lawyers is a non-profit corporation organized for the purpose of gathering together lawyers distinguished for their expertise and high standards of professional and ethical conduct in the practice of real estate law, in order, *inter alia*, to improve and reform real estate law and practice and to speak upon matters of interest and importance to real estate law and practice. The College has over 700 members from every state and the District of Columbia. They represent owners, borrowers, lenders, purchasers, sellers, developers, in short, those having reasonable investment-backed expectations to use real property within constitutional bounds. College members are required to have concentrated their practice in real estate law for a period of not less than ten years. Additional requirements established by the Board of Governors include a demonstrated willingness to devote time to improving real property law, by writing, teaching or participating in organized bar projects.

The College is interested in this case because it substantially impacts private property rights affected by government land use regulations. The decision below establishes a "threshold inquiry" that eliminates most takings claims and converts those claims into substantive due process challenges, thus circumventing the rights secured by the Court in *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304 (1987). The Washington Supreme Court effectively again relegates relief from excessive regulations to mere invalidation of the offending measure.

Because of the profound constitutional issue involved, as well as the important practical ramifications for those persons specially concerned with landowners being entitled to just compensation when land use regulations deprive them of the economically viable use of their land and where invalidation of the regulation cannot be the exclusive remedy, the College supports Petitioner in its Petition for Writ of Certiorari to the Washington Supreme Court.

SUMMARY OF ARGUMENT

The Washington Supreme Court in the case at bench ignored established precedent of this Court when it formulated a new standard for determining when regulation of property effects a taking requiring just compensation. That court held that a taking occurs only when the government regulation enhances a publicly owned right in property. This narrowly drawn definition of a taking has no basis in the decisions of this Court or any other court. The Washington Supreme Court expressly stated that it is only under those limited circumstances that a property owner would be entitled to compensation. Despite the fact that this Court in *First English* expressly held that the Fifth Amendment requires that regulatory takings be compensated, the Washington Supreme Court effectively held that a regulatory taking (as that term is defined by this Court and every other federal and state court) is a violation of substantive due process that can only be remedied by invalidation of the regulation. If this Court allows that decision to stand, without granting the Petition for Writ of Certiorari and overturning that decision,

such may, and probably will, be perceived as tacit approval of the Washington Supreme Court's analysis.

The Washington Supreme Court also incorrectly identified the relevant parcel for takings purposes by looking at the entire 4.5 acres owned by the Presbytery, rather than only that segment of the property that is subject to regulation. The Washington Supreme Court's holding that the parcel must be viewed in its entirety is in direct conflict with decisions of this Court, federal courts, and state courts. The issue of the relevant parcel for takings purposes is an issue that requires resolution by this Court.

ARGUMENT

I. THE WASHINGTON SUPREME COURT HAS APPLIED A STANDARD FOR IDENTIFYING AND COMPENSATING REGULATORY TAKINGS THAT DIRECTLY CONFLICTS WITH ESTABLISHED CASE LAW, INCLUDING DECISIONS OF THIS COURT, LOWER FEDERAL COURTS, AND STATE COURTS.

A. The Washington Supreme Court has created a definition of regulatory taking which conflicts with this Court's decisions and the decisions of all other state and lower courts.

In *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980), this Court held that a regulation as applied to a particular property may effect a taking if it does not substantially advance legitimate state interests (citing *Nectow v. Cambridge*, 277 U.S. 183, 188 (1928)), *or* if it "denies an owner economically viable use of his land" (citing *Penn Central*

Transp. Co. v. New York City, 438 U.S. 104, 138, n. 36 (1978)).[1] This simple definition of a Fifth Amendment regulatory taking includes within it both regulations which strip property of value and regulations which fail a substantive due process test by not substantially advancing legitimate state interests. This simple, all-inclusive definition has repeatedly been used by this Court. *See Nollan v. California Coastal Commn.*, 483 U.S. 825, 834 (1987); *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 485 (1987); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1985); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 (1981).

Whether the application of a regulation results in a taking is a highly *ad hoc* undertaking and not subject to analysis by a set formula. *Penn Central*, 438 U.S. at 124. It is "a question of degree – and therefore cannot be disposed of by general propositions." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922).

Equally clear, this Court has never defined a taking based on whether a benefit accrued to the government. To the contrary, as this Court long ago held: " . . . The

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[1] Many federal circuit courts have expressly followed the *Agins* approach, demonstrating the continuing efficacy of this Court's *Agins* description of a taking: *Lake Nacimiento Ranch Company v. County of San Luis Obispo*, 841 F.2d 872, 877 (9th Cir. 1987) (as-applied taking claim dismissed on ripeness grounds, facial claim analyzed under *Agins); Sederquist v. City of Tiburon*, 765 F.2d 756, 761 (9th Cir. 1984); *A.A. Profiles, Inc. v. City of Ft. Lauderdale*, 850 F.2d 1483, 1486 (11th Cir. 1988); *Jackson Court Condominiums, Inc. v. City of New Orleans*, 874 F.2d 1070, 1080 (5th Cir. 1989); *Georgia Outdoor Advertising v. City of Waynesville*, 900 F.2d 783, 787 (4th Cir. 1990).

question is, What has the owner lost? not, What has the taker gained?" *Boston Chamber of Commerce v. Boston*, 217 U.S. 189, 195 (1910).

Nevertheless, the Washington Supreme Court in the case at bench[2] created a new definition of a regulatory taking which conflicts with this Court's decisions and the decisions of all other state and lower federal courts by announcing a wholly different test: a taking occurs *only* if the regulation " . . . actually enhances a publicly owned right in property." Pet.App. A-9. Were Washington's new and aberrant test to stand, virtually no regulatory infringement upon the rights of property owners would be a taking. Under the new Washington test, if "all" the government is doing is preventing harm (rather than enhancing its rights in specific property already owned by the government), then no taking would occur.

B. The Washington Supreme Court has restricted the ability of a property owner to recover just compensation to such an extent that it has undone this Court's Constitutionally mandated *First English* decision.

The United States Constitution, expressly and as interpreted by this Court, provides the remedy of compensation for regulatory takings. Prior to this Court's opinion in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987), there

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[2] References to *Presbytery of Seattle v. King County* will be to the version printed in Appendix "A" of Petitioner's Petition for Writ of Certiorari in this Court and will be denominated as follows: Pet.App. A-#.

was confusion as to whether the Fifth Amendment admonition – "nor shall property be taken without just compensation" – applied to takings of property that resulted from regulation of property. Four times prior to *First English*, this Court faced the issue of compensation of regulatory takings and, in each case, did not reach the issue. *MacDonald, Sommer, & Frates v. Yolo County*, 478 U.S. 1035 (1986); *Williamson County Regional Planning Commission v. Hamilton Bank*, 477 U.S. 340 (1986); *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981); *Agins*. In *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 636 (1981) (Brennan, J., dissenting) Justice Brennan, in dissent, formulated the standard that was eventually adopted by this Court in *First English*. In *First English*, this Court ended the confusion when it held that the standard adopted by the California Supreme Court, that regulatory takings could only be remedied by invalidation and not by compensation, violated the Fifth Amendment.

Earlier this year, in *Preseault v. I.C.C.*, 494 U.S. ___, 108 L.Ed.2d 1, 110 S. Ct. ___ (1990), this Court confirmed its *First English* conclusion that the just compensation remedy is not only required by the Constitution, but also that it must be first availed before any challenge may be made that the regulation is otherwise unconstitutional. The decision below virtually repeals the compensatory remedy which this Court concluded was "necessarily implicate[d]" by the Fifth Amendment in *First English*.

After decades of uncertainty about whether a regulation which goes too far requires compensation, this Court clearly settled the issue in *First English*. In the case at

bench, the Washington Supreme Court adopted a standard whose effect is the same as that of the California standard expressly rejected by this Court. The Washington Supreme Court, seemingly defiantly, effectively held that compensation is to be denied under almost every imaginable scenario where governmental regulation impacts the use of property to the point that the owner is entitled under *First English* to just compensation for the deprivation, albeit temporary. In the words of the Washington Supreme Court:

> If the regulation is not aimed at the legitimate public purpose, or uses a means which does not tend to achieve it, or if it unduly oppresses the landowner, then the ordinance will be struck down as violative of due process and the remedy is invalidation of the regulation.

Pet.App. A-12.

Subparagraph (c) of Rule 10 of the Rules of this Court could not have envisioned a more obvious conflict between applicable decisions of this Court and the decision of the Washington Supreme Court herein sought to be reviewed.

As if the question of the constitutionally required remedy were still an open question and *First English* did not exist, the Washington Supreme Court speculates: "Invalidation of the ordinance (instead of compensation) also avoids intimidating the legislative body. . . . " Pet.App. A-12. In *First English*, this Court rejected such a rationale for refusing compensation:

> We, of course, are not unmindful of these considerations, but they must be evaluated in

> the light of the command of the Just Compensation Clause of the Fifth Amendment.

482 U.S. at 317.

> We realize that even our present holding will undoubtedly lessen to some extent the freedom and flexibility of land-use planners and governing bodies of municipal corporations when enacting land-use regulations. But such consequences necessarily flow from any decision upholding a claim of constitutional rights; many of the provisions of the Constitution are designed to limit the flexibility and freedom of governmental authorities, and the Just Compensation Clause of the Fifth Amendment is one of them.

482 U.S. at 321.

This Court's review is absolutely essential to avoid the judicial chaos, both inherent and predictable, if the Washington Supreme Court's radically different test is allowed to stand. Surely, Justice Stevens had a different conflagration in mind, when, in dissent in *First English*, he opined that the majority's decision was a "loose cannon" that would ignite a "litigation explosion." The Washington Supreme Court's decision below will, if not overturned, create such an explosion, rather than the settled framework for analysis left in the wake of *First English*. Washington has announced no mere "nuisance exception" to the general rule that just compensation is required when the government regulates the value out of private property. "The nuisance exception . . . is not coterminous with the police power itself." *Penn Central*, 438 U.S. at 145. The Fifth Amendment "is designed not to limit the governmental interference with property rights per se, but rather to secure compensation in the event of

otherwise proper interference amounting to a taking." *First English*, 482 U.S. at 315.

Even if the potential for confusion and wasteful litigation as a result of the decision below were not so obvious for the country as a whole, at least the citizens of Washington are entitled to the benefit of this Court's decisions protecting their constitutional rights. They are not under a separate umbrella devoid of either federalism or the supremacy clause.

If the decision below is allowed to stand, other state and federal courts would be pressed to adopt its rationale and many courts may do so, notwithstanding *First English*, thus creating results for property owners throughout the nation inconsistent with the mandate of *First English*. Rightly or wrongly, they would view a denial of certiorari as tacit approval by the court, or at least a conclusion by this Court that the decision below can co-exist with *First English*.

II. DEFINING THE RELEVANT PARCEL FOR TAKING PURPOSES IS AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

In the case at bench, the Washington Supreme Court held that the relevant unit of property for takings purposes was a "parcel of regulated property." 787 P.2d at 914. The Court stated that the takings analysis must view the parcel in its "entirety." *Id.* at 915. The Washington court views the entire parcel as the 4.5 acres that are under the single ownership of the Presbytery. The Court ignores the "ad hoc factual" nature of takings analysis,

which is reflected in the decisions of this Court, lower federal courts, and state courts.

The Washington court relies heavily on this Court's decisions in *Keystone* and *Penn Central*. Admittedly, those decisions expressed a takings standard that required consideration of the parcel as a whole; however, other decisions of this Court have held that the denial of just one property right may constitute a taking. In *Hodel v. Irving*, 481 U.S. 704, 718 (1987), this Court held that the denial of a single strand of property interest (deprivation of right to devise property) was a taking. Similarly, in *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), this Court held that the denial of the right to exclude was sufficient to constitute a taking. What these cases demonstrate is that different circumstances require different analyses.

The wetlands regulations at issue in this case forbid the development of specifically designated property. The complete prohibition of development of specific property, despite the size of that property, is a taking. This Court's decisions in *Penn Central* and *Keystone* support a finding of a taking in the case at bench. In *Penn Central*, this Court defined the entire parcel as the entire area of regulated property, which was the city tax block designated as a historic site (the Grand Central Terminal). In *Keystone*, this Court found no taking by comparing the amount of coal that could not be used with any "reasonable unit" of the plaintiffs' coal mining operations. Again, it was the coal mining operations generally that were being regulated. In this case, if we compare the amount taken with the area regulated, we find that no development is permitted on the entire area being regulated – the wetlands.

The decision below conflicts with decisions of other state and federal courts. Clearly, if the frontage of a large tract, or corner of a large tract, or that portion of a tract which made the remainder valuable were over-regulated so as to result in a taking requiring just compensation, the Washington Supreme Court's newly adopted *entirety* theory compels a holding that neither a taking nor deprivation of the portion regulated occurred, nor that any compensation would be available. By contrast, other courts have held that regulatory stultification of part of a larger tract of land can be a taking which requires compensation. *Fifth Avenue Corp. v. Washington County,* 282 Ore. 591, 581 P.2d 50 (Ore. 1978) (part of property zoned for transit station and greenbelt); *Twain Harte Assoc., Ltd. v. County of Tuolumne,* 217 Cal.App. 3d 71 (1990) (part of property zoned open space); *American Savings & Loan Assn. v. County of Marin,* 653 F.2d 364 (9th Cir. 1981) (part of property zoned for density too low to permit economic use).

The Washington Supreme Court itself has addressed this issue. In *Allingham v. Seattle,* 109 Wash. 2d 947, 749 P.2d 160 (1988), the applicable portion of which it expressly overrules in this case, the Washington Supreme Court found a taking where a Seattle greenbelt ordinance affected only a portion of the owner's parcel. The Washington court in *Allingham* expressly rejected the argument that because the regulation only affected a portion of the owner's property it was not a taking:

> According to this argument, the City should be allowed to regulate away all rights of ownership to a portion of a person's property so long as some part of the property remains usable. We find this argument unpersuasive. If the City

> were to take a portion of certain properties for the purpose of building a road, clearly we would hold that the city must pay for the land so taken. Likewise where, as here, the City takes a portion of certain properties for the purpose of preserving greenbelts, the City must pay for the land taken. To permit the City to accomplish the same purpose under the guise of a zoning regulation would be inequitable and would constitute an unconstitutional taking of private property without just compensation.

109 Wash. 2d 947, 749 P.2d at 163.

The Washington court's analogy in *Allingham* to physical invasion is correct. The regulation at issue here deprives the property owner of the use of its property in the same manner that a physical invasion of its property would deprive it of that use. This Court has held that a physical invasion, no matter the size, is a taking. *See Loretta v. Teleprompter Manhattan CATV Corporation*, 458 U.S. 419, 435-36 (1982).

The Washington Supreme Court's new *entirety* thesis is inconsistent with either logic or prior decisions of this Court. Simply stated, if Washington had to condemn by eminent domain the portion of the Presbytery's property it would be required to pay just compensation for the property taken.

Accordingly, the College respectfully suggests to the Court that the relevant parcel for takings purposes is, indeed, a very important question of federal law that should be settled by the Court so that the post-*First English* and *Nollan* cases that are being determined in both the state and lower federal courts have guidance so

as to provide a consistently fair doctrine in keeping with prior precedent of this Court.

CONCLUSION

For the foregoing reasons, the American College of Real Estate Lawyers respectfully urges this Court to grant the Petition for Writ of Certiorari and reverse the decision of the Washington Supreme Court.

DATED: September 17, 1990

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SEP 14 1990

No. 90-298

In The

Supreme Court of the United States

October Term, 1990

PRESBYTERY OF SEATTLE,

Petitioner,

v.

KING COUNTY,

Respondent.

On Petition For Writ Of Certiorari To The Washington Supreme Court

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF OREGONIANS IN ACTION IN SUPPORT OF PETITIONER, PRESBYTERY OF SEATTLE

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES CITED ii

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF OREGONIANS IN ACTION IN SUPPORT OF PETITIONER PRESBYTERY OF SEATTLE 1

BRIEF AMICUS CURIAE OF OREGONIANS IN ACTION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI 4

INTEREST OF AMICUS CURIAE 4

STATEMENT OF THE CASE 5

REASONS FOR GRANTING THE PETITION 5

CONCLUSION 8

TABLE OF AUTHORITIES CITED

Page

CASES

Lynch v. Household Finance Corp., 405 U.S. 538 (1972) 2

Nollan v. California Coastal Commission, 483 U.S. 825 (1987) 2

Penna. Coal Co. v. Mahon, 260 U.S. 393 (1922) 6

RULES

Supreme Court Rule 37 1

Or. Admin. R. 660-15-000 (5) 5

UNITED STATES CONSTITUTION

Fifth Amendment 6, 7

Fourteenth Amendment 6

No. 90-298

In The

Supreme Court of the United States

October Term, 1990

PRESBYTERY OF SEATTLE,

Petitioner,

v.

KING COUNTY,

Respondent.

On Petition For Writ Of Certiorari To The Washington Supreme Court

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF OREGONIANS IN ACTION IN SUPPORT OF PETITIONER, PRESBYTERY OF SEATTLE

This motion of Oregonians In Action (OIA) for leave to file the annexed brief amicus curiae is respectfully submitted pursuant to Supreme Court Rule 37. Consent to the filing of this brief has been granted by counsel for petitioner; this consent has been lodged with the Clerk of this Court. Consent has been withheld by counsel for King County.

OIA is an Oregon non-profit corporation. It is deeply involved throughout the state of Oregon in protecting the

rights of private landowners against excessive land use regulations being imposed at all levels of government. It is actively involved in legislation, regulatory reform, litigation, research and education. It is in contact with tens of thousands of landowners through newsletters, bulletins, and other communication efforts. Our efforts are supported entirely by voluntary contributions of time and money.

OIA is motivated by the firm belief that private landowners should not bear burdens that in all fairness and justice should be borne by the public, a concept reiterated by Justice Scalia in *Nollan v. California Coastal Commission*, 483 U.S. 825, 835 n.4 (1987). OIA is also motivated by a strong belief that reasonable protection for private property is essential to maintain the resource allocation and efficiency functions of our market system. Moreover, OIA agrees with Justice Stewart that the protection of private property is essential to maintain all other civil rights protected by the U.S. Constitution. *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972).

In this proceeding, OIA seeks to augment the arguments in the petition for certiorari by highlighting 1) the adverse impacts on landowners in Oregon which could flow from the Washington decision, and 2) the need to clarify and strengthen constitutional protection for private property. OIA believes the decision of the Washington Supreme Court is incorrect and poses a serious threat to property rights.

For the foregoing reasons, Oregonians In Action requests that this motion for leave to file the annexed brief amicus curiae be granted.

DATED: September 14, 1990.

Respectfully submitted,

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By _____
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No. 90-298

In The

Supreme Court of the United States

October Term, 1990

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Petitioner,

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On Petition For Writ Of Certiorari To The Washington Supreme Court

BRIEF AMICUS CURIAE OF OREGONIANS IN ACTION IN SUPPORT OF PETITIONER, PRESBYTERY OF SEATTLE

INTEREST OF AMICUS CURIAE

The interests of amicus are set forth in the preceding motion for leave to file brief amicus curiae of Oregonians In Action (OIA).

STATEMENT OF THE CASE

Oregonians In Action adopts the Statement of the Case set forth in the Petition for Writ of Certiorari.

REASONS FOR GRANTING THE PETITION

Oregonians In Action is deeply concerned over the extent to which regulators, responding primarily to pressure from special interest groups, are restricting the use of private land (without paying any compensation) to protect resources such as wildlife habitat, open space, and wetlands (much of which bears little resemblance to the swamps, bogs and estuaries which most people believed the wetlands program was intended to protect). For example, here is an excerpt from Goal 5 of the Oregon Land Conservation and Development Commission (Or. Admin. R. 660-15-000 (5)) which describes the "open space and natural and scenic resources" to be protected under Oregon's land use regulatory system:

"a. Land needed or desirable for open space;

b. Mineral and aggregate resources;

c. Energy sources;

d. Fish and wildlife areas and habitats;

e. Ecologically and scientifically significant natural areas, including desert areas;

f. Outstanding scenic views and sites;

g. Water areas, *wetlands*, watersheds and groundwater resources (emphasis added);

h. Wilderness areas;

i. Historic areas, sites, structures and objects;

j. Cultural areas;

k. Potential and approved Oregon recreation trails;

l. Potential and approved federal wild and scenic waterways and state scenic waterways."

This Goal 5 list of resources to be protected is so sweeping it could result in the "taking" of almost every acre of private rural land, and much urban land.

Many regulatory bodies and special interest groups are insisting regulatory powers be used instead of eminent domain to acquire such resources on private land for "public interest" purposes, literally making a mockery of constitutional protection for private property. This is exactly what Justice Oliver Wendell Holmes feared when he said: "When this seemingly absolute protection [for private property] is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears." *Penna. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

Under current interpretations of case law on "takings" under the Fifth and Fourteenth Amendments, there are already very formidable, costly barriers to recovering compensation for regulatory "takings" or to securing other relief.

The decision, review of which is sought by Petitioner Presbytery of Seattle, would impose even greater barriers to recovery of compensation.

First, the Washington Court's "threshold inquiry" for reviewing constitutionality of land use regulations is a revolutionary concept. *Second*, the effect of such an approach will be denial of any opportunity to recover compensation for taking – the only possible remedy will be invalidation, which is totally in conflict with the "just compensation" command of the 5th Amendment. *Third*, the lower court's criteria for determining the "relevant unit" to be considered in takings analysis flies in the face of any reasonable interpretation of Constitutional protection for private property.

The Washington court's decision represents a sharp and radical break from historical precedents and undermines "regulatory taking" principles enunciated in those precedents.

CONCLUSION

The decision of the Washington Supreme Court denying compensation for a regulatory taking is a huge step backward at a time when there is a compelling need for forward steps to protect private property against regulatory takings. The decision, if not reversed, will become a persuasive precedent that could have widespread adverse impacts on property rights throughout the state of Oregon.

DATED: September, 1990.

Respectfully submitted,

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SEP 17 1990

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On Petition for Writ of Certiorari to the Washington Supreme Court

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE AMERICAN FARM BUREAU FEDERATION IN SUPPORT OF PETITIONER

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Respondent.

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF THE AMERICAN FARM BUREAU FEDERATION

The American Farm Bureau Federation respectfully moves for leave to file the attached brief *amicus curiae*, pursuant to Supreme Court Rule 36. Respondent King County has refused to grant us consent to file a brief.

MOTION OF AMICUS CURIAE

The American Farm Bureau Federation (AFBF) is a non-profit general farm organization incorporated pursuant to the laws of the State of Illinois. Its purposes are to promote, protect and represent the economic, social and educational interests of farmers and ranchers across the country. The largest general farm organization in the United States, AFBF has member state organizations

in all 50 states and Puerto Rico, representing the interests of more than 3.6 million member families.

The protection of private property rights is of paramount importance to farmers and ranchers. Farmers and ranchers are increasingly becoming subject to land-use regulations at the local, state and national levels that either restrict their ability to farm or eliminate that ability altogether. One recent example of the type of regulations that are threatening agricultural production and adversely affect private property rights pertain to "wetlands." Federal, state and local governmental agencies are defining "wetlands" in such a way that lands do not even had to be "wet" to qualify, and are insisting that lands which have already been converted from "wetlands" to farmland now revert to "wetland" status. The net effect of these policies is to take a significant amount of potentially productive and privately owned farmland out of agricultural production.

The Fifth Amendment to the U.S. Constitution prohibits the "taking" of private property for public use without providing just compensation. Governmental land-use and wetlands policies raise important Fifth Amendment "taking" issues as applied to farmers and ranchers. As land-use regulation becomes more pervasive, it is crucial that both the constitutional limitations placed on governments in the exercise of their authority and the protections afforded to regulated landowners be applied in a consistent manner across the country. Governments and landowners alike benefit from consistent applications of Fifth Amendment principles as set forth by this Court.

The decision of the Washington State Supreme Court below represents a radical departure from established Fifth Amendment takings jurisprudence. The analysis of the court below not only is at loggerheads with the long established principles of this Court, but it would render the private property protections of the Fifth Amendment virtually non-existent in land use regulatory situations.

If permitted to stand, the citizens of Washington State would be deprived of the protections of the takings clause in those situations where they are most necessary to preservation of private property rights.

WHEREFORE, Applicant American Farm Bureau Federation prays that its Motion for Leave to file a brief *Amicus Curiae* in favor of the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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Dated: September 17, 1990

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS CURIAE	1
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	3
I. THE "THRESHOLD INQUIRY" CONCEPT AND DISTINCTIONS BETWEEN SUBSTANTIVE DUE PROCESS ANALYSIS AND FIFTH AMENDMENT TAKINGS ANALYSIS CONFLICTS WITH LONG ESTABLISHED FIFTH AMENDMENT TAKINGS JURISPRUDENCE	3
II. THE RULE ESTABLISHED BY THE COURT BELOW IS UNWORKABLE	8
III. THE DECISION BELOW GOES BEYOND ANY INTERPRETATION OF THE TAKINGS CLAUSE AS DEFINED BY THIS COURT	10
IV. THE COURT BELOW APPLIED AN INCORRECT UNIT OF PROPERTY MEASURE	12
CONCLUSION	13

TABLE OF AUTHORITIES

CASES — Page

Armstrong v. United States, 364 U.S. 40 (1959) .. 12
First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987) ..4, 6, 7, 8
Hughes v. Washington, 389 U.S. 290 (1967) (Stewart, J., concurring) 9
Keystone Bituminous Coal Association v. DeBenedictus, 480 U.S. 470 (187) 10
Mugler v. Kansas, 123 U.S. 623 (1897) 3
Orion v. State of Washington (Orion II), 747 P.2d 1062 ..... 7, 8
Penn Central Transportation Company v. City of New York, 438 U.S. 104 (1978) 5, 12
Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) 3, 4, 5
Preseault v. Interstate Commerce Commission, 110 S.Ct. 914 (1990) 6, 7, 10
San Diego Gas & Electric Company v. City of San Diego, 450 U.S. 621 (1981) (Brennan, J., dissenting) 9
Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980) 5

CONSTITUTION

Fifth Amendment to the U.S. Constitution .....*passim*
Fourteenth Amendment 3

MISCELLANEOUS

"Regulatory Taking Doctrine in Washington: Now You See It, Now You Don't", 12 U. Puget Sound L. Rev. 3399, 349 (1989) (Richard L. Settle) 3, 7, 8
San Diego Gas: Problems, Pitfalls and a Better Way," 25 Wash. U.J. Urb & Contemp.L. 3, 76-77 (1983) 5
Tucker Act [28 U.S.C. 1491(a)(1)] 6, 10

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BRIEF *AMICUS CURIAE* OF THE AMERICAN FARM BUREAU FEDERATION IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE

The American Farm Bureau Federation (AFBF) is a non-profit general farm organization incorporated pursuant to the laws of the State of Illinois. Its purposes are to promote, protect and represent the economic, social and educational interests of farmers and ranchers across the country. The largest general farm organization in the United States, AFBF has member state organizations in all 50 states and Puerto Rico, representing the interests of more than 3.6 million member families.

The protection of private property rights is of paramount importance to farmers and ranchers. Farmers and ranchers are increasingly becoming subject to land-use

regulations at the local, state and national levels that either restrict their ability to farm or eliminate that ability altogether. One recent example of the type of regulations that are threatening agricultural production and adversely affect private property rights pertain to "wetlands." Federal, state and local governmental agencies are defining "wetlands" in such a way that lands do not even have to be "wet" to quailfy, and are insisting that lands which have already been converted from "wetlands" to farmland now revert to "wetland" status. The net effect of these policies is to take a significant amount of potentially productive and privately owned farmland out of agricultural production.

The Fifth Amendment to the U.S. Constitution prohibits the "taking" of private property for public use without providing just compensation. Governmental land-use and wetlands policies raise important Fifth Amendment "taking" issues as applied to farmers and ranchers. As land-use regulation becomes more pervasive, it is crucial that both the constitutional limitations placed on governments in the exercise of their authority and the protections afforded to regulated landowners be applied in a consistent manner across the country. Governments and landowners alike benefit from consistent applications of Fifth Amendment principles as set forth by this Court.

The decision of the Washington State Supreme Court represents a radical departure from established Fifth Amendment takings jurisprudence. The analysis of the court below not only is at loggerheads with the long established principles of this Court, but it would render the private property protections of the Fifth Amendment virtually non-existent in land use regulatory situations. If permitted to stand, the citizens of Washington State would be deprived of the protections of the takings clause in those situations where they are most necessary to preservation of private property rights.

STATEMENT OF THE CASE

The case is as stated by the Petitioner. We would, however, like to emphasize that the court below based its decision on a construction of federal "takings" law as set forth by the Fifth Amendment and applied by the Fourteenth Amendment, and did not premise its decision on an interpretation of the state Constitution.

Although it might be tempting to characterize the decision as merely affirming the dismissal of the case on the grounds that petitioner failed to exhaust its administrative remedies, and that the Fifth Amendment analysis is merely dicta, in a prefatory note to the decision, the court below said that the issues of exhaustion and taking "are interrelated and cannot be analyzed as separate and distinct inquiries." (Pet., A-6). It is therefore unclear to what extent the flawed takings analysis played in deciding that petitioner had failed to exhaust his administrative remedies.

REASONS FOR GRANTING THE WRIT

I. THE "THRESHOLD INQUIRY" CONCEPT AND DISTINCTIONS BETWEEN SUBSTANTIVE DUE PROCESS ANALYSIS AND FIFTH AMENDMENT TAKINGS ANALYSIS CONFLICTS WITH LONG ESTABLISHED FIFTH AMENDMENT TAKINGS JURISPRUDENCE.

Most constitutional authorities agree that the "modern era" of regulatory takings analysis began in 1922 with the landmark decision of *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).[1] Prior to 1922, cases challenging overzealous regulatory exercises of governmental police powers were judged according to standards of substantive due process.[2] In *Pennsylvania Coal*, the Court found that

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[1] See e.g., Settle, Richard L., "Regulatory Taking Doctrine in Washington: Now You See It, Now You Don't", 12 U. Puget Sound L. Rev. 339, 347 (1989).

[2] See e.g., *Mugler v. Kansas*, 123 U.S. 623 (1897).

such overreaching regulation is a "taking" under the Fifth Amendment takings clause. For the past 68 years, this Court and others following its lead have analyzed regulatory issues, such as presented in the case below, according to the "general rule" of *Pennsylvania Coal*" that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[3]

In 1987 this Court decided three cases which sought to clarify certain aspects of the regulatory takings jurisprudence. In one of those cases, *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), this Court re-emphasized that "just compensation" is the appropriate remedy when governmental regulation has gone too far and unduly infringed private property rights. Fifth Amendment "regulatory takings" analysis was now more firmly entrenched than ever.

The decision below would change all of this. The general rule of *Pennsylvania Coal* and the past 68 years of Fifth Amendment precedent would no longer apply.[4] Instead, the Washington court conducted a "threshold inquiry" to determine if the regulation "safeguards the public interest in health, safety, the environment or the fiscal integrity of the area." Next, the court stated that it must inquire "whether the regulation destroys one or more of the fundamental attributes of ownership." If a regulation does not infringe one of the attributes of ownership and if it protects the public from one of the listed harms, then "no constitutional 'taking' requiring just compensation exists."

Nowhere in any of the decisions of this Court is this sort of analysis adopted. The opinion cites no United

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[3] 260 U.S. 415.

[4] Under the rule espoused by the court below, it is doubtful that *Pennsylvania Coal* would even be analyzed in Fifth Amendment takings terms.

States Supreme Court case to support the novel idea of a "threshold inquiry" to determine whether or not overzealous regulation should be decided according to substantive due process or the takings clause. It cites no Supreme Court authority to support the criteria for determining such a "threshold inquiry". It can cite no Supreme Court decision to even support the concept of two different categories of judicial analysis.

This analysis departs significantly from that of established takings jurisprudence. *Pennsylvania Coal* and the subsequent 68 years of federal takings law have considered the *degree* to which regulations interfere with private property rights in determining whether a Fifth Amendment taking has occurred. See e.g. *Penn Central Transportation Company v. City of New York*, 438 U.S. 104 (1978) (setting forth factors to be considered in takings analysis). By contrast, the decision below would consider the *kind* of regulation at issue in determining whether a taking has occurred. This attempt to differentiate regulations subject to the Fifth Amendment takings clause from those that are not represents a radical departure from established Supreme Court Fifth Amendment precedent.[5]

The United States Supreme Court's regulatory taking doctrine is binding on the states. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980). As a matter of federal law, the Fifth Amendment takings clause is properly construed by this Court. Any changes in interpretation should be made by this Court not by state courts. Conversely, state courts that interpret federal law in such a radically different way from established federal precedent should be corrected. Not only

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[5] See Stoebuck, "San Diego Gas: Problems, Pitfalls and a Better Way," 25 Wash. U.J. Urb. & Contemp.L. 3, 76-77 (1983). Stoebuck, a leading proponent of this "revisionist" takings doctrine, freely admits that his theory "differs fundamentally and radically" from established Fifth Amendment takings thinking.

does the decision below depart from this Court's regutory taking doctrine, but it directly conflicts with it. The Washington State Court would remove a significant category of regulatory actions from the Fifth Amendment "Takings Clause" analysis, and instead view them according to a substantive due process analysis. For those cases that would be considered according to a substantive due process, the only available remedy is invalidation of the regulation, and not compensation.

The reasoning of the Washington State Court was specifically rejected by *First English Evangelical Lutheran Church v. County of Los Angeles, supra.* The Court held that police power regulation is not only subject to the takings clause, but that "in the event of a taking, the compensation remedy is required by the Constitution." 107 S.Ct. at 2386. In fact, the Court in *First English* expressly reversed a California decision which, as here, sought to limit the application of established regulatory takings doctrine and to limit the availability of the "just compensation" remedy.

This principle was emphatically reiterated just this year in *Preseault v. Interstate Commerce Commission*, 110 U.S. 914 (1990). *Preseault* reiterates the basic tenets of *First English* that just compensation is the remedy mandated by the Constitution for a "taking". ("[The Fifth Amendment] is designed "not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking." (Emphasis in original) (110 S.Ct. at 921.) *Preseault* not only reinforces the viability of the compensation remedy, but also specifies the mechanism (the Tucker Act) for pursuing it.

Both *First English* and *Preseault* appear to reinforce the idea that otherwise valid regulation which unduly infringes private property rights should not be overturned if just compensation" is available. Thus, "just compensation" not only is the remedy, but it is the safety

valve to rescue otherwise valid but overreaching regulation.

The decision below ignores both *First English* and *Presecault*, and is in direct conflict with the principles of those two cases. Rather than view compensation as the way to save overzealous regulation, the court below dismisses the compensation remedy altogether in a significant category of regulatory cases.

Significantly, the Washington State Supreme Court itself realizes that its Fifth Amendment takings analysis conflicts with the decisions of this Court. In *Orion v. State of Washington (Orion II)*, 747 P.2d 1062 (cited extensively in the decision) it was admitted that "Certain aspects of our state regulatory takings doctrine appear to conflict with federal analysis." However, rather than attempting to follow or even reconcile these differences, these conflicts are summarily dismissed as "more linguistic than substantive." [6] As indicated above, that is certainly not true.

This line of argument that began with *Orion II* and that continues with the decision below has been roundly criticized by no less than Richard L. Settle, described by the court below as a "well respected commentator on land use law". Settle writes:

> "The most serious difficulty with the revised rule is its inconsistency with the very minimum standards of federal regulatory taking law it was revised to meet. This is true not only of the revised rule itself, but also of the premise underlying both the ideal rule and the revised rule—that some police power regulation, probably most police power regulation, is not even subject to the taking limitation." [7]

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[6] 747 P. 2d 1079-84.

[7] Settle, "Regulatory Taking Doctrine in Washington: Now You See It, Now You Don't," 12 U. Puget Sound L. Rev. 339, 375 (1989).

While Settle recognizes that the scope of the regulatory takings clause might have once been debatable, he also recognizes that the debate has now been settled. He says:

> "Regardless of its merits, this line of argument was explicitly rejected recently by the United States Supreme Court in *First English Evangelical Lutheran Church v. Los Angeles County.* The Court clearly held that police power regulation is subject to the taking clause and its remedy of inverse condemnation damages. Moreover, the holding was not limited to regulation that does not substantially serve public interests in health, safety, environment, and the fiscal integrity of the community." [8]

The decision below is so fundamentally opposed to this Court's interpretation of the Fifth Amendment as to be tantamount to judicial mutiny. Unless this Court reviews the case below and corrects its analysis, it's reasoning could be adopted in other states. Or it could be embellished further by the Washington courts, as the decision below built on *Orion II.*

II. THE RULE ESTABLISHED BY THE COURT BELOW IS UNWORKABLE.

In addition to being in direct conflict with Fifth Amendment taking jurisprudence established by this Court, the rule set forth by the court below is unworkable. Under the rule, regulatory actions which seek to "prevent harm to public interests in health, safety, the environment or the fiscal integrity of the area" are to be exempt from the takings clause and analyzed in accordance with substantive due process. Regulations that go "beyond preventing a public *harm* and actually enhance a publicly owned right in property" are subject to the takings analysis. It is a distinction of prevention of public harm on the one hand and conferral of a public benefit on the other.

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[8] *Id.*

In our governmental scheme, however, these are merely two sides of the same coin. "Because police power regulations must be substantially related to the advancement of the public health, safety, morals or general welfare, it is axiomatic that the public receives a benefit while the offending regulation is in effect." *San Diego Gas & Electric Company v. City of San Diego*, 450 U.S. 621, 656 (1981) (Brennan, J., dissenting). Any distinctions between the two are nothing more than a matter of semantics rather than substance. Even the Washington State Court acknowledged this difficulty:

> "We realize that the determination of whether a given regulation seeks to protect the public from harm will not always be an easy decision. Both the conferral of benefit and the prevention of harm are often present in varying degrees." [9]

Nevertheless, the decision below says that this distinction must be made.

Yet, under the Washington State scheme, the manner in which a regulation is characterized becomes of paramount importance, because that characterization will determine how the case is analyzed and what remedy is available. It will pre-occupy judicial time and energy toward resolving artificial differences on how to "package" the case properly, while taking away from the real issues —the effect of the regulation on private property rights.

Yet focusing on the effects of the regulation is exactly what the Constitution requires. "[T]he Constitution measures a taking of property not by what a State says, or by what it intends, but by what it *does*." *Hughes v. Washington*, 389 U.S. 290, 298 (1967) (Stewart, J., concurring). Since at least 1922 it is clear that it is the *effect* of a regulation which courts have considered in takings cases, and not the intent or stated purpose of a regulation.

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[9] Petition, p. A-9, ftn. 15.

As a practical matter, this decision will also create confusion for Washington litigants in determining the proper court to pursue their regulatory taking cases. The federal Tucker Act [28 U.S.C. 1491(a)(1)] provides jurisdiction in the U.S. Claims Court for any claim founded on the Constitution. That jurisdiction is exclusive for claims over $10,000. Moreover, substantive due process claims are properly brought in federal district court. The Tucker Act remedy applies to Fifth Amendment takings claims (*Preseault v. Interstate Commerce Commission*, (110 S.Ct. 914 (1990)), even where the underlying regulation or statute is silent on the compensation issue.

The Washington scheme puts federal litigants in a quandary. Given a fact situation such as the case below, in what court do plaintiffs bring their suit? If that court conducts the required "threshold inquiry" and determines that the case is improperly brought in that court, plaintiffs would have to re-file. Is the second court bound by the "threshold decision" of the first court? What if the second court also conducts a "threshold inquiry," and decides differently than the first court?

III. THE DECISION GOES BEYOND ANY INTERPRETATION OF THE TAKINGS CLAUSE AS DEFINED BY THIS COURT.

The decision below cited this Court's opinion in *Keystone Bituminous Coal Association v. DeBenedictus*, 480 U.S. 470 (187) as support for the proposition that there is a "categorical exclusion" from the takings clause for some exercises of the police power. More specifically, the court below discussed this in terms of holding that there was an exemption from Fifth Amendment takings if the police power was aimed at preventing a public nuisance. While *Keystone* relied to a great extent on the "public interest" purpose of the statute in holding that there was no taking, the Court also made it clear that the "public interest" aspect was only one consideration in a regula-

tory takings analysis, and stopped short of a "public nuisance" exception.

But even if such an exception were part of the takings jurisprudence, this case does not present such a situation. Rather, the police power complained of pertains to the preservation of a certain wetland, which the court had determined to be desired for its wildlife habitat. Thus, although the preservation of this wetland might be a valid exercise of the police power, it is not the type of regulation designed to protect the "public health and safety." Use of the wetland by petitioners certainly would not be a "public nuisance." There is even considerable doubt as to whether the court below even applied its own narrow standard correctly to this case. According to the Washington State Court, only a regulation that "goes beyond preventing a public *harm* and actually enhances a publicly owned right in property" [10] is to come under the Fifth Amendment takings clause. Yet, that seems to be precisely the situation presented in the case below. The ordinance is not aimed at "preventing harm to the community," but in preserving a wetland. Petitioners would not engage in a "public nuisance" *per se* by developing part of that wetland.

The announced intent operation of the ordinance is to preserve the public's interest in that wetland by preventing its alteration. The ordinance both goes beyond the "prevention of harm" and also "protects a publicly held interest" in the wetland. Even under the Washington State Court's limited takings clause applciation, its decision was wrong.

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[10] Petition, p. A-9.

IV. THE COURT BELOW APPLIED AN INCORRECT UNIT OF PROPERTY MEASURE.

The court below based its findings that there was no "taking" because the petitioners had not been deprived of all use of their property.[11] The concept of the "relevant portion" of property to be considered in a takings case has not lent itself to easy definition.

In *Penn Central Transportation Company v. City of New York*, 438 U.S. 104 (1978), the Court set forth three criteria: the nature of the action, diminution of the property as a whole, and the impact of the action on reasonable investment backed expectations. These criteria are to be applied on a base by case basis.

The application of these criteria in *Penn Central* itself may not produce the same outcome in the present case. Relevant to the *Penn Central* decision were the facts that (1) the property could be used for the purposes for which it had been used in the past, and (2) the ordinance allowed for the transfer of development rights of Penn central to another parcel. Neither of those conditions is present here.

We submit that the three-part analysis of *Penn Central* is really an ad hoc application of the fundamental principle underlying the whole Fifth Amendment Takings issue —whether the regulation is "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." [12]

Applied to this case and to similar wetland protection cases, we submit that the relevant portion of the parcel to be considered is the area of the wetland itself, rather

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[11] While such a showing might be required to invalidate a police power statute, a finding that there has been a taking requiring compensation might be satisfied with a lesser showing.

[12] *Armstrong v. United States*, 364 U.S. 40, 49 (1959).

than the entire parcel. There is no public harm that the regulation seeks to remedy. Where, as here, the wetland is preserved for wildlife habitat, the interest to be served is a "public benefit" whose cost should be borne by the public at large.

In any event, these kinds of determinations must be made on a case by case basis, dependent on the nature of the regulatory action and the economic harm done.

CONCLUSION

The Fifth Amendment to the U.S. Constitution guarantees private property owners that their property will not be taken for public use without payment of just compensation. The United States Supreme Court, as highest court in the land, is the final authority on what the Fifth Amendment means. Farmers, ranchers and landowners everywhere look to this Court to protect and define the rights guaranteed by the Fifth Amendment.

That final authority as interpreter of our Constitutional rights is undermined when courts like the one below radically depart from established Supreme Court precedent and engage in free-wheeling judicial theorizing that has no basis in this Court. Left unchecked, such radical departures from this Court's jurisprudence will become entrenched in their jurisdictions and possibly spread to other jurisdictions. This threat is even greater when the issues involve protection of private property rights. With the Administration's announced "no net loss of wetlands" policy, the specific issue of whether preservation of such wetlands might be a taking under the Fifth Amendment looms large in many affected jurisdictions.

If permitted to stand, the radical departure of the Washington State Supreme Court could very well create judicial chaos when it collides with established U.S. Supreme Court precedent in other states. At the very least, it has deprived the citizens of the State of Washington

of fundamental Constitutional rights guaranteed by the Fifth Amendment as applied by this Court.

The differences between the Washington view of the Fifth Amendment and the U.S. Supreme Court's view of the Fifth Amendment are too great. This conflict will have to be addressed sooner or later by this Court. It is better to do it sooner so as to remove all doubts. The Petition for Grant of the Writ of Certiorari should be granted.

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